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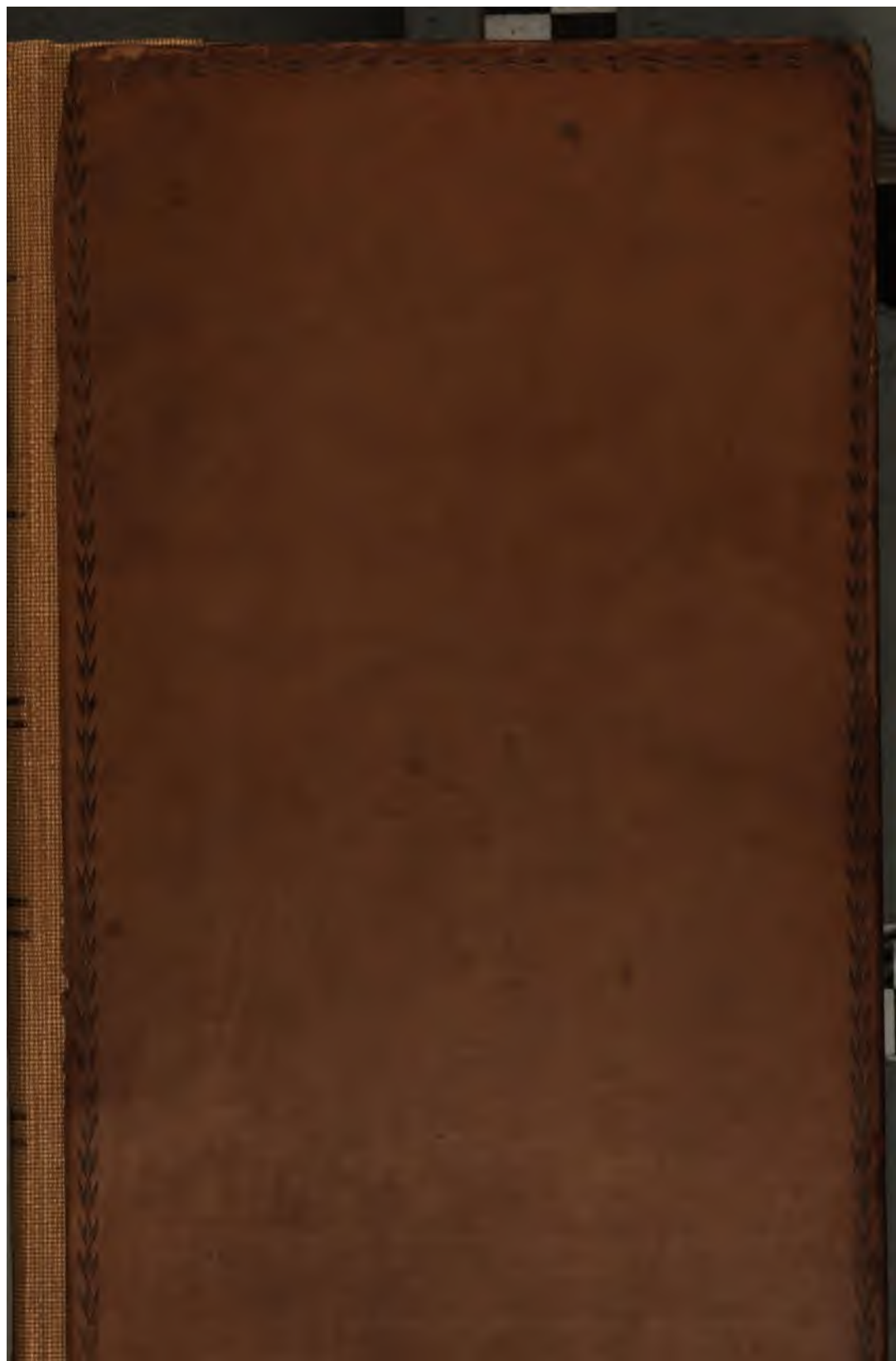
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THE
HISTORY
OF THE
CASES
OF
Controverted Elections,

WHICH WERE
TRIED AND DETERMINED
During the First and Second Sessions of the Fourteenth
Parliament of Great Britain, 15 & 16 GEO. III.

BY THE RIGHT HONOURABLE
SYLVESTER DOUGLAS,
LORD GLENBERVIE.

Mais si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être
à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient
une opinion particulière du juge, on vivroit dans la société sans sçavoir pré-
cisément les engagemens que l'on y contracte.—L'Esprit des Loix, liv. xi. c. 6.

Quod neque inflecti gratiâ, neque perfringi potentiâ, neque adulterari pecu-
niâ possit.—Cic.

IN FOUR VOLUMES.
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XIV.

THE
C A S E

Of the BOROUGH of

H E L L E S T O N,

In the County of CORNWALL.

VOL. II.

B

The COMMITTEE was chosen on Friday the 10th of March, and consisted of the following Gentlemen.

Sir John Hynde Cotton, Bart.		
Chairman. - - - - -		Cambridgeſh.
Sir George Cornwall, Bart. - -		Herefordſhire
George Bridges Brudenell, Eſq. -		Rutlandſhire
Sir Matthew White Ridley, Bart.		Newcaſtle
Francis Page, Eſq. - - - - -		Oxford Univ.
William Drake, jun. Eſq. - - -		Agmondeſham
Sir Francis Vincent, Bart. - - -		Surrey
Viſcount Wenman, - - - - -	Members for	Oxfordſhire
Richard Benyon, Eſq. - - - - -		Peterborough
Hon. James Murray, - - - - -		Perthſhire
Rowland Holt, Eſq. - - - - -		Suffolk
John Tempeſt, Eſq. - - - - -		Durham
John Damer, Eſq. - - - - -		Dorcheſter

N O M I N E E S.

Of the Petitioners,

George Johnſtone, Eſq. - - - Appleby

Of the Sitting Member,

Bamber Gaſcoyne, Eſq. - - - Truro.

P E T I T I O N E R S.

Philip Yorke, Eſq. and Francis Cuſt, Eſq.

Richard Johns, jun. alderman, and Matthew Wills, Richard Johns, Edmund Johns, Richard Penhall, and William Rogers, freemen of Helleſton.

Sitting Members.

The Right Hon. Francis Godolphin Osborne, commonly called the Marquis of Carmarthen, and Francis Owen, Eſq.

C O U N S E L,

For the Petitioners.

Mr. Lee, Mr. Morris.

For the Sitting Members.

Mr. Mansfield, Mr. Bearcroft; and, the ſecond day, Mr. Buller, (in Mr. Bearcroft's abſence.)

THE
C A S E

Of the BOROUGH of

H E L L E S T O N.

ON Saturday, the 11th of March, the Committee being met, the two petitions were read, containing special allegations of the principal part of the following facts, which were all, either proved, or admitted, on the trial of the cause.

Helleston is a borough by *prescription*, and also by a charter of the 27th of Queen Elizabeth, *confirmed* by another of the 16th of Charles the First.

By those charters, the corporation was to consist of a mayor, four aldermen, and an indefinite number of freemen. The freemen were to be elected out of the *inhabitants*, by the mayor, aldermen, *and* [4] *commonalty*, or the major part of them; the aldermen, by the mayor and aldermen, out of the freemen; the mayor, by the freemen, out of two aldermen, to be nominated by the mayor and aldermen. The right of election of burgesses to serve in Parliament has constantly been, in the mayor and *commonalty*,

monalty, which has always been understood to mean, the mayor, aldermen, and freemen only.

(☞ There is no determination of the House of the right of election, but it was admitted to be as just stated.)*

Almost ever since the time when the charter of Queen Elizabeth passed, notwithstanding the provision there made, the mayor and aldermen had assumed, and exercised, the exclusive power of electing freemen, and the commonalty had never had any share in it.

[5] In Easter term, 1769, two informations †, in the nature of *Quo Warranto*, were exhibited in the court of King's Bench, against several persons of the borough, to shew by what authority they claimed to be freemen, having been elected without the concurrence of the commonalty. In their plea, they insisted on a bye-law, not then existing in writing, by which the right of electing freemen was restrained to the mayor and aldermen. The prosecutor replied to this plea, denying the matter of the bye-law, and other facts alledged in it; and

* [Dec. 10, 1660. The Committee of Privileges and Elections reported (on a re-commitment, and in confirmation of their former report of Nov. 7.) that it appeared to them, "That *the mayor and inhabitants at large* have the right of election;" and that the person having the greater number

of the votes of the said inhabitants at large, was duly elected. But the question being put in the House, it was disagreed to. Journals, vol. 8. p. 203. col. 1.]

† [*Rex v. Hoblyn* and others, and *Rex v. Head* and others.]

HELLESTON.

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issues being joined thereon, one of the causes was tried at the summer assizes for Cornwall, in 1769, by a special jury, when a verdict was found for the defendants on all the issues: but, in Michaelmas term of the same year, the court was moved for leave to enter up judgment against the defendants, notwithstanding the verdict, the prosecutor contending that the bye-law, on which they had founded their title, was repugnant to the charters, and void. The court were of that opinion, and judgment was entered up accordingly. The prosecutor then moved for, and obtained, leave to withdraw his replication in the other cause, and, having instead thereof demurred to the plea of the defendants, judgment of ouster was pronounced against them. From these judgments, writs of error were brought in the House of Lords, and the judges being called in, one of the causes was argued by counsel, after which the judges delivered their opinion, "That the election of freemen could not be exercised by the mayor and aldermen exclusive of the commonalty." On this the judgment of the King's Bench was affirmed*.

[6]

By these, and other prosecutions of the same sort, judgment of ouster was obtained against all the members of the corporation except two aldermen and eight freemen.

By the statute of the 9th of Anne, cap. 20. sect. 4. a *discretionary power* is vested in the Court of

* [*Brown's Cases in Parliament*, vol. 6. p. 511.]

C A S E XIV.

[7]

King's Bench, to give leave to exhibit informations in the nature of *quo warranto* by the officer of the court, at the instance of private prosecutors, or (as they are called in that kind of criminal proceeding) *relators*. About ten or twelve years ago,* the court thought proper to establish a rule to guide their discretion, by resolving never to grant informations against any corporator who had been in possession of his franchise twenty years, or upwards.

An information had been moved for against Hugh Rogers, one of the two remaining aldermen, and a rule granted to shew cause why such information should not be allowed; but in the interval between granting the rule and the time appointed for shewing cause, the twenty years, during which he had possessed the franchise of a freeman, were completed. The court therefore, in compliance with the above rule, would not grant the information. For the same reason informations could not have been obtained against any of the other nine remaining corporators, they having all been freemen *de facto*, (though elected according to the

* [This was in the *Winchelsea Cases*, M. 7. G. 3. 4. Burr. 1962. Since the first edition of this work, viz. E. 31. G. 3. in the case of *Rex v. Dickinson*, 4 Term Rep. p. 282. 284. the Court of B. R. have narrowed the time much more, having laid it down as a general rule "that they would limit their own discretion in granting applications of this nature to six years, beyond which time they would not, under any circumstances, suffer a party who had been so long in possession of his franchise, to be disturbed."] uſage

HELLESTON.

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usage now determined to be illegal) for above twenty years.

An information was exhibited against Richard Johns, the other remaining alderman, for usurping the office of *mayor*.

Such being the state of the borough, a petition [8] was presented to the King in Council in November 1772, from several merchants, tradesmen, freeholders, and inhabitants of Helleston, in which Thomas Glynn and Thomas Wills, two of the ten remaining corporators, joined; stating the two charters, and the facts just mentioned, and alledging, that the corporation was *totally dissolved*; praying therefore such relief as should be thought fit.

This petition was referred to a Committee of the Privy Council, and by them (19 Dec. 1772) to the Attorney and Solicitor General; who were attended by counsel both on the part of the petitioners, and on behalf of the major part of the subsisting corporators, who had entered a *caveat* against the petition.

The Attorney and Solicitor General reported (1 March 1773) the facts which have been stated, and that, since 1770, there having been only two aldermen *de facto*, and none but freemen *de facto*, and *no mayor*, a question was then depending in the Court of King's Bench (in the cause against Richard Johns) whether the corporation was dissolved on that account, or whether it might not continue itself by operation of the statute of the 11th of George the First. [9]

ter, they gave their opinion, that it would be inexpedient to advise the King to consider the corporation as dissolved, or to grant a new charter, while a competent number of freemen held their places *in fact*, and unquestioned by any judicial process, and while it remained in suspense in a court of justice, whether the corporation *might not continue itself by course of law*.

Afterwards, in Easter term 1773, the cause alluded to was decided, and judgment given against Richard Johns; and, in the month of June of the same year, Hugh Rogers, the other alderman, died.

The corporation then consisted of only one alderman and eight freemen, and there was no mayor.

[10] On this change of circumstances, the agent for those who had petitioned in November 1772, presented to the Lords of the Committee, a new petition, stating the alterations which had taken place, and that he was advised that the corporation was *totally and absolutely dissolved*, and incapable of preserving or continuing itself, and could never *be revived or regain a legal existence, unless the King should think proper to grant a new charter of incorporation*.

3 July 1773, this petition was also referred to the Attorney and Solicitor General, and they were attended by counsel for the petitioners, and by the solicitor for those who opposed the petition.

10 August 1773, they reported the state in which

HELLESTON.

10

which the corporation was at that time; that they were of opinion, *that it could no longer continue itself*; and that it would be proper to advise the King to grant a new charter.

Upon this report, the agent for those who solicited a new charter presented another petition to the King in Council, praying, on their behalf, that certain alterations from the charter of Queen Elizabeth, stated in a paper annexed to the petition (A) might be introduced into the new charter.

In November 1773, a petition was presented to the King in Council from twenty-six inhabitants of the borough of Helleston, praying to be made members of the corporation, if a new charter should be granted, [11]

At the same time, Matthew Wills one of the freemen (on behalf of himself, of Richard Johns the alderman, of the other four petitioners in the second petition presented to the House of Commons (1) and of a fifth freeman, since dead, being seven out of the nine remaining corporators), presented a petition to the King in Council, setting forth, that the proceedings in order to obtain a new charter tended to injure the rights of the members of the old corporation, and praying that the Attorney and Solicitor General might be ordered to review their two former reports, and that he and the other persons on whose behalf he petitioned, might be heard by their counsel

(1) *Vide* List of the Committee, &c. *supra*.

on

on those reports, and against the original petition.

19 November 1773, these two last-mentioned petitions were referred to a Committee of the Privy Council.

- [12] 17 January 1774, the petition of the agent for those who solicited the new charter was, by the Committee of the Privy Council, referred to the Attorney and Solicitor General, who, on the 26th of the same month, were attended by counsel, both on the part of the original petitioners, and for the aldermen and six corporators who opposed the new charter; and, on the 9th of May following, they reported their opinion, as before, that it would be expedient and just for his Majesty to grant a new charter on the general plan of that of Queen Elizabeth, but with some of the additions and variations which had been proposed (B). The proposed alterations of which they approved were stated in their report, and two of them were,

“ That the freemen who, notwithstanding the
“ charter, had, by the usage, been excluded from a
“ share in the election of new freemen, should be
“ expressly excluded by the new charter. And,

“ That, by the new charter, a competent number
“ of fit persons should be appointed freemen.”

- [13] They stated, that the former of these two alterations had been strongly opposed,

12 May, 1774, the agent for the Alderman and five burgeses, opponents of the new charter, (the sixth having died about this time,) being a majority

city of six to two of the eight now subsisting corporators, presented a petition to the Committee of the Privy Council, praying, that they might be heard by their counsel against such of the deviations from the old charter, recommended by the Attorney and Solicitor General, as they conceived to be injurious to their just rights and privileges.

28 May, the Lords of the Committee took under consideration the last Report of the Attorney and Solicitor General, and the last-mentioned petition, and, having heard counsel on both sides, reported to the King, that they were of opinion, that a new charter should be granted with the alterations recommended by the Attorney and Solicitor General.

1 June, the King in Council approved of the report of the committee of the Privy Council, and ordered, that the Attorney and Solicitor General should prepare a new charter *in conformity to their report*.

[14]

15 August, the Lord Privy Seal, assisted by the Chief Baron of the Exchequer, having heard counsel on both sides, ordered the privy seal to be affixed to the new charter:

And, on the 3d of September, the Lord Chancellor, with whom a *caveat* had been entered, heard counsel on both sides, and ordered the great seal to be affixed to the charter, which accordingly bears date the 3d of September, 1774.

In the recital thereof, it is said, "That the corporation is now *in danger of being dissolved* and
" incapable

“incapable of continuing itself, or of exercising
“and enjoying any of its liberties and franchises;”
and this expression was substituted in place of
words importing, that it *was dissolved*, in consequence of the arguments of counsel.

[15]

A mayor, four Aldermen, and thirty-one freemen, including the mayor and aldermen, were appointed *nominatim* by this charter. Richard Johns was made an alderman, and the other seven remaining corporators of the old body were appointed among the new freemen.

The charter was, on the 8th of September, delivered to Thomas Glynn, Esq. the new mayor, who accepted it, and, on the 9th, issued notices severally to all the new corporators, requiring them to meet on the 12th, in order to accept the charter and the offices to which they were thereby named. Accordingly, in consequence of those notices, they met on the 12th, and all, *but the six old corporators*, petitioners to the House of Commons, accepted the charter and their offices, and took the oaths. Each of those six severally *read a protest against the charter*, and refused to accept or act under it.

On Sunday, the 25th of September, the corporation met for the choice of a mayor (the Sunday before Michaelmas being the day fixed for that purpose both by the old and new charters) and *John Rogers, Esq.* was elected. The six protesting freemen did not attend at this election.

[16]

The precept for the election of members of Parliament was sent by the sheriff to *Mr. Rogers*, who gave

gave notice that the election would be on the 11th of October.

On the day of election, the precept being read by Mr. Rogers as mayor, all the new members of the corporation, but the six who had refused the charter, voted for the two sitting members. The six, after *protesting* against the legality of Rogers acting as presiding officer, gave their votes at *his* poll for Mr. Yorke and Mr. Cust. They afterwards proceeded by themselves to make an election of those two gentlemen. Richard Johns *there* acted as presiding officer, and made a return which was delivered to the sheriff. Rogers also made a return of the sitting members, which he annexed to the precept, and delivered to the sheriff. John's return was first received; but the sheriff, having taken the advice of counsel (Mr. Serjeant Davy and Mr. Buller), annexed the return made by Rogers to the writ, and sent it by his agent to the clerk of the crown. He also sent him the other return by his agent, but not annexed to the writ. When the last-mentioned return was tendered to the clerk of the crown, he said he could not receive it, as it was not annexed to the writ. It was accordingly rejected, and sent back to Cornwall, but was produced by the under sheriff, on the trial before the Committee.

[17]

The agent for the six corporators, who opposed the new charter, swore that he had obtained a copy of the first draft from the Attorney General, but that, though he had made repeated applications to him

him, to the Lord Privy Seal, and at the secretary of state's office, he could not obtain a list of the names of the new corporators till the 3d of September, on the hearing before the Chancellor. The Lord Privy Seal had desired the names to be read over to him, on the hearing before him on the 15th of August, but he said it had not been in his power to take them down in writing.

[18] Under all the circumstances of this case, the counsel for the petitioners contended;

1. That the new charter was void, and that the only persons who had a right to elect members of Parliament for Helleston, were the subsisting freemen under the old charter.

2. That if the charter were valid, still the freemen appointed by it not having been in possession of their franchise a year before the election, they were, by the statute of the 3d of the present King, cap. 15, incapable of voting at the last election, and therefore the only competent electors, at that time, were the subsisting members of the old corporation.

Their arguments were as follows.

1. If the old body existed as a corporation when the charter passed, and when it was tendered, acceptance by the majority of the old corporators was necessary to make it valid; and as they, after opposing it in every stage as containing essential alterations and variations from the former constitution of the borough, rejected it when offered for acceptance, it became, by such refusal, void to all intents and purposes.

It

It is unnecessary to cite cases to prove, that acceptance is necessary to give validity to a new charter granted to a subsisting corporation. This is an established and uncontrovertible principle of law, inasmuch, that in pleading the new charter in such a case, you must set forth that it was accepted.

The question then is, whether, in the present instance, the old corporation existed when the charter was tendered.

It is admitted that it did not exist so perfectly as to be able to elect new corporators so as to continue itself. But it was not, therefore, dissolved.

There are only three ways by which a corporation can cease to exist:

1. Forfeiture, by *abuser* or *non-user*.
2. Voluntary surrender.
3. The death of all the *natural* persons, members of the corporate body.

Forfeiture cannot dissolve a corporation but by judgment of ouster against the whole.

Surrender can only be by acceptance on record.—But there is no pretence of surrender in this case.

And there is no question but that eight of the natural persons, members of the aggregate body, are still alive. [20]

It is true, that some of the *integral* parts of the corporation are gone: There is no mayor; and only one alderman: Therefore, it does not exist with sufficient vigour to continue itself.

But

But it exists so as that the individuals, who still remain members of it, can do many acts, and exercise several franchises, as corporators (C). They can enjoy any right of common belonging to the corporation; they can accept or refuse a charter; and they can vote for members of Parliament. If they can, no new charter can transfer that right from them to another corporation.

The cases of Bewdley, Plympton, Durham, and Colchester, are authorities in point, to prove this doctrine.

[21] In the case of Bewdley (1), a new charter had passed the great seal in 1708, and was tendered to the corporation just on the eve of an election for members of Parliament. The corporation being in a situation very similar to that of Helleston, the charter was refused by the subsisting members of the old body. In 1710, Mr. Lechmere was chosen one of the representatives of the borough by the new corporation, and Mr. Winnington by the members of the old who had refused the charter. The matter was brought before the House by petition (2), when the three following resolutions were come to, 19 December, 1710.

1. Resolved, "That Salway Winnington, Esq. is duly elected a burgess to serve in this present Parliament for the borough of Bewdley.

(1) 1. Peere Williams, p. vol. iv. p. 174.
207. The Queen, v. the bailiffs and burgesses of Bewdley. (2) Journ. 1 Dec. 1710. vol. xvi. p. 408. col. 1, 2.
Chandler's Debates, an. 1710.

2. Resolved,

2. Resolved, "That the charter, dated the 20th
 " of April, 1708, attempted to be imposed upon
 " the borough of Bewdley, against the consent of
 " the ancient corporation, is void, illegal, and [22]
 " destructive of the constitution of Parliament.

3. Resolved, "That an humble address be pre-
 " sented to her Majesty, laying before her Majesty
 " the resolution of this House, and to desire her
 " Majesty that she will be pleased to give direc-
 " tions to her Attorney General, to take the pro-
 " per methods for repealing the said charter, and
 " for quieting the said borough in the enjoyment
 " of their rights and privileges (1)."

Accordingly, an address was presented, and, in
 compliance with that address, a writ of *Scire facias*
 was sued out to repeal the charter, and issue being
 joined upon it, the cause was tried at the bar in the
 court of Queen's Bench, and a general verdict
 found for the Queen against the charter.

Afterwards, indeed, a new trial was moved for,
 and obtained, and then a special verdict was found,
 which seems never to have been argued, and no [23]
 further proceedings appear to have taken place.
 This will be objected to the authority of this case;
 and it will be observed, that the borough of Bewd-
 ley has ever since 1712 acquiesced under the charter
 of Queen Anne, and that the corporation now
 exists under it. But no argument can be drawn
 from the agreement of the parties, which must have

(1) Journ. vol. xvi. p. 439. col. 1.

been the occasion of the proceedings being dropt; and the resolution of the House of the 18th of December, 1710, is a direct parliamentary decision against the legality of the charter.

[24] The case of Plympton was as follows. In 1684 (12 July), the corporation had been prevailed upon to surrender their charter, and a new one was granted by James the Second, 21 March, 1684, under which new charter two members were chosen and returned to Parliament; but on a petition of the mayor, bailiff, &c. of the old corporation (1), the election and return were determined to be void, and the House, 14 April, 1690, Resolved, "That
 " the charter, granted by the late King James to
 " the borough of Plympton, is illegal, and destruc-
 " tive to the constitution of the government.(2)."

And John Avent, the pretended mayor, and returning officer, was sent for into the custody of the serjeant at arms (3).

The corporation of Durham has had no mayor for several years, and is in that imperfect state that it cannot elect one according to the constitution of the borough. A new charter has long been in agitation, but the bishop and the corporation differing about the terms, it has never taken place, nor has he ever imagined that he could impose one upon them without their consent. Yet, in this

(1) Journ. vol. x. p. 352. (2) Journ. vol. x. p. 378.
 col. 1. & *infra*. 24 March, col. 1.
 1689. 29 March, 14 April, (3) Ibid, col. 2.
 1690.

situation,

situation, they have elected members of Parliament (1), and nobody ever pretended that those members were illegally chosen.

But the case of Colchester is quite decisive.

[25]

In that case, as reported by Sir James Burrow (2), it appears that the corporation of Colchester, under the old charter of the 15th of Charles the Second, consisted of a mayor, to be chosen annually from among the aldermen, 11 aldermen, 18 assistants, and 18 common-council, the corporate name being, "*The mayor and commonalty.*"

In 1735, one William Seaber executed a bond to the mayor and commonalty. In 1740 there were judgments of ouster pronounced against all the persons acting *de facto* as mayor and alderman in Colchester, and all those persons were dead before the year 1763. 9 Sept. 1763, the present charter was granted, and accepted, and has been acted under ever since. In Easter term, 1766, the new corporation brought an action of debt on Seaber's bond against his executor.

The question then was, Whether the present corporation could maintain the action, which depended on another question, *viz.* Whether the old corporation was dissolved in 1763.

[26]

On this occasion Lord Mansfield said:

"The corporation is not dissolved by the judgments of ouster, and subsequent deaths of the

(1) One of the Members for Durham was on the Committee.
(2) 3 Burr. 1866. Mayor and commonalty of Colchester, v. Seaber.

“ mayor and aldermen, though they are without
 “ their magistracy. Their constitution is not de-
 “ stroyed and gone. Their former rights remain.
 “ Would not a freeman of Colchester still con-
 “ tinue to have a *right to common, or to vote for mem-*
 “ *bers to Parliament ?—*

“ I am clear, upon principles of law, that the
 “ old corporation was not *absolutely dissolved* and
 “ annihilated, though they had lost their magi-
 “ strates.—Where there is a judgment against the
 “ corporation itself, the case would be of a different
 “ consideration.”

The other Justices, Wilmot, Yates, and Aston,
 concurred.

[27] This was decided after solemn argument by some
 of the ablest lawyers in Westminster-hall.

The very preamble of the new charter of Hellef-
 ton acknowledges that the old corporation was not
 dissolved ; for it states it to be “ *in danger of being*
 “ *dissolved.*”

It therefore appears, from principle and prece-
 dent, that the old corporation existed when the
 new charter was tendered ; that, if there never had
 been a new charter, the old corporators had a right
 to choose the representatives for the borough ; that
 the new charter having been rejected, it is to be
 considered as void, and as if it had never existed.

But, if this doctrine were not so clear as it has
 been shown to be, still,

2. The new corporators could not vote at the
 last

last election, having been made freemen within the year.

By the statute of the 3d of George the Third, it is enacted, "That no person whatsoever claiming
 " as a freeman to vote at any election of members
 " to serve in Parliament for any city, town, port, [28]
 " or borough in England, Wales, and the Town
 " of Berwick upon Tweed, where such voter's
 " right of voting is as a freeman only, shall be
 " *admitted* to give his vote at such election, un-
 " less such person shall have been *admitted* to the
 " freedom of such city, town, port, or borough,
 " twelve kalendar months before the first day of
 " such election (1)."

The present case is within the very *words* of this statute; for the expression "*admitted* to his freedom," ought not to be restrained to a narrow technical sense, as implying only formal admissions to freedom, which cannot take place when a corporation and its individual members are created by a charter.—The word "*admitted*," is here used in its general popular sense.

And certainly the case is within the *spirit* of the statute. The mischief which the legislature meant to remedy appears by the title. It is called "An
 " act to prevent *occasional* freemen from voting at [29]
 " elections of members to serve in Parliament for
 " cities and boroughs." Those new corporators,

(1) 3 Geo. III. cap. 15. § 1.

appointed only one month before the election, were, surely, *occasional* freemen.

If the act were only to extend to freemen not *admitted* (to their freedom) above a year, in a subsisting corporation, the greater mischief would still remain without a remedy; for a minister would have it in his power to elude the law, by creating by charter such a number of freemen; as would suffice to turn the election.

COUNSEL for the sitting members.

1. When the new charter passed, the old corporation was totally dissolved.

2. The six who refused the charter, cannot be considered as acting, on that occasion, in a *corporate* capacity, but merely as *individuals*, and, therefore, their refusal did not affect the validity of the charter.

3. The votes of the members of the new corporation were not affected by the statute of George the Third.

[30] A corporation is a political person, which, like a natural person, is capable of a variety of actions. It may renew itself. It may acquire, or grant lands, or personal property. It may sue, or be sued, in a court of law. It may make laws and regulations for its own government, &c.

The power of creating corporations is in the King, by his prerogative royal. They all exist, either by charter, or by prescription, which *presumes* a charter before the time of legal memory. They
are

are created for the purposes, either of trade, or the administration of justice.

Every corporation aggregate consists of certain integral parts, chalked out by the hand which formed it. If it ceases to have the form given it, if any of its vital parts are lost, it no longer exists in that state in which it was endowed with its particular powers; it is no longer that thing on which those powers were conferred; and therefore it ceases to exist.

One essential attribute of a corporation is the name. That name *must* be employed in all acts done by the corporation. The name of the old corporation of Helleston was, "The mayor and
[31]
"commonalty;" but as there neither is nor can now be a mayor, the name is lost.

A corporation can only act when assembled in a corporate capacity (C), and there can be no legal assembly unless it be called by the mayor, or chief officer (except in some particular cases where it is otherwise provided by act of Parliament (1)).

If this corporation had been possessed of lands, and ousted, they could not have brought an action to recover them. If their tenant were in arrears for his rent, they could not distrain or sue for it. If their mace were taken away, they could not maintain *trover* for it as a corporate body, though the person who had the custody of it might, in his *private* capacity as an individual.

(1) 11 Geo. I. cap. 4. *Vide infra*,

If the corporation was dissolved, the remaining individuals who had belonged to it could neither accept nor refuse the new charter but as individuals, and the refusal by six of them cannot conclude any body but themselves.

- [32] The general doctrine applies with particular force to the present case, for here the eight subsisting corporators were chosen illegally. Johns has sworn that they were elected in the same manner with those who have been ousted (1). They might therefore have been all turned out, either by the ancient writ of *Quo Warranto*, or by an information in the nature of a *Quo Warranto* filed by the Attorney General. The discretionary rule with regard to twenty years possession is only binding on the court that made it. It cannot affect the power of the Attorney General. It ought not to prevent this Committee from enquiring into the titles of those men. Such limitations cannot be made to operate generally, and to conclude all persons and all courts, but by act of Parliament.

- [33] The proceedings of the House of Commons in the case of Bewdley will not have much weight, when the whole of them are taken together, and the spirit of the times when that case happened is taken into the account.

In 1708, soon after the new charter was granted, Henry Herbert, Esq. a whig, was elected under it,

(1) This Johns himself acknowledged on his examination before the Committee.

and returned; and Salway Winnington, Esq. a tory, was chosen under the old charter. On a petition of Mr. Winnington (1), the House, *at that time*, resolved, " That Samuel Slade, nominated bailiff by " a charter granted by her Majesty (i. e. the new " charter) for maintaining the peace and good " government of the said borough, was rightful " bailiff of the said borough, at the time of the " election of a burghers to this present Parliament;" and declared that Mr. Herbert (then Lord Herbert of Cherbury) was duly elected (2). In 1710, a new contest happened, but then the tories were the reigning party, and the steps which have been mentioned by the counsel for the petitioners were on that occasion taken by the House. In 1714, there was a third contest, and the whig candidate was chosen, and returned by the new corporation. Mr. Winnington, who was again a candidate, and stood on the same ground as formerly, petitioned (3); but, before his petition could be heard, the well-known revolution in the ministry took place, and he judged proper to withdraw it (4).

[34]

The prosecution at law never came to a decision. The first verdict was against the opinion of the court. The Chief Justice (5) had directed the jury to reserve the points of law, " for that they

- | | |
|-------------------------------|-------------------------------------|
| (1) Journ. vol. xvi. p. 11. | vol. p. 123. col. 2. 17 May. |
| col. 1. 24 Nov. 1708. | (4) Same vol. p. 135. col. 1. |
| (2) Journ. same vol. p. 97. | 24 May. <i>Vide supra</i> , Introd. |
| col. 2. 8 Feb. 1708-9. | p. 15. |
| (3) Journ. vol. xviii. p. 32. | (5) Parker, afterwards Lord |
| col. 2. 30 March 1715. Same | Macclesfield. |

" were

"were of too great moment to be determined without consideration." One of those points was, "Whether the corporation could subsist without one of its integral parts (1)?"

[35] In that case there was a sort of ground for contending that the old corporation was not dissolved, for there was a bailiff *de facto*, and judgment had been given for him (2) in 1707, on an information in the nature of *Quo Warranto*. The bailiff was the integral part of the corporation supposed to be lost.

But after all, as this cause never came to a determination, and the old corporation acquiesced in the new charter, which has been acted under ever since, this case is rather in favour of the new charter of Helleston.

In the case of Plympton, there had been a compulsive surrender of the old charter, and the new one materially altered the constitution of the borough, by putting the magistrates entirely in the power of the Crown, and by narrowing the right of election. On these grounds the House determined the new charter to be illegal. This does not appear directly from the Journals, but it may be [36] fairly inferred from the history of the many *Quo Warrantos*, surrenders, and new charters, which made such a noise at the latter end of the reign of Charles the Second, and the beginning of that of James the Second, and particularly from the ac-

(1) Peere Will. *loc. cit.*

(2) Journ. vol. xvi. 8 Feb. 1708-9.

count given in the Journals of the proceedings of the House in the case of the borough of Ludlow, which had received a new charter similar to that of Plympton, in like circumstances, and in the same year (1).

Durham is in a situation very different from that of the old corporation of Helleston. In Durham, persons acquire their freedom, either by servitude or election into companies, at certain guilds holden by those companies. The *admission* by the mayor is a mere ceremony, and when there is no mayor to perform that ceremony, they are entitled to vote for members of Parliament without it. There are new freemen made every day at Durham, although the corporation has been so long without a mayor, so that there is no danger of the right of election coming to be a sort of monopoly in the hands of two or three obscure persons, which would be the case in Helleston, if the doctrine contended for on the part of the petitioners were true. For no new freemen could ever have been chosen under the old charter.

[37]

The determination in the case of Colchester was substantially *just*, for it was shameful in the defendant to attempt to elude the payment of the money; but, as a *legal* decision, it gave great astonishment in Westminster-Hall, and the words which the reporter has put in the mouths of the Chief Justice, and the other Judges, are unsupported by any case in his book, and are against law. They contain a

(1) Journ. vol. x. p. 521, 522. 22 Dec. 1690.
monstrous

monstrous doctrine. The court determined the cause immediately after the counsel had finished their arguments, without leaving any interval for deliberation: and the counsel for the defendants cited no cases, although many might have been produced in his favour, as, indeed, on examination, many of those will appear to be, which are said to have been cited against him.

[38]

But whatever may have fallen from the court on that occasion, the same court, and two of the same Judges, in a very recent case from this very borough of Colchester, upon a motion for a *mandamus* to the mayor and aldermen to choose forty-eight guardians of the poor, under a statute of the 9th and 10th of King William, by which a corporation was created, consisting of the mayor, aldermen, and forty-eight guardians of the poor, refused to grant the *mandamus*, because one of the *integral parts* being gone, the corporation itself was dissolved (D).

[39]

It is said, the recital of the new charter states, that the "old corporation was *in danger* of being "dissolved;" and thereby admits that it was not *actually extinct*, but if these words are to be taken so very strictly, still they can only show that the Attorney and Solicitor General, who prepared the charter, doubted, where, in truth, there was no room for doubt. They are not the words of the petitioners, and the whole of the charter proceeds on the supposition that a *new* corporation was to be *created*, not the old one revived.

There

There are many authorities and cases which shew that the loss of an integral part is to be considered as occasioning a dissolution of the corporation.

In Rolle's Abridgement, under the title "*Quelle chose dissolv la Corporation,*" it is said, "If a corporation is made of brothers and sisters, and then all the sisters are dead, all grants and *acts* done by the brothers afterwards are void; for when the sisters are dead, it is not a perfect corporation (1)."

And in Comyns's Digest, vol. iv. p. 415. "If a corporation refuses to continue the election of officers till all die who could make an election, the corporation is dissolved."

In the third year of George the First, an information, in the nature of *Quo Warranto*, was exhibited against one Mr Painton, recorder of Banbury, for exercising that office, when the corporation having slipt the charter-day for the election of their mayor, that integral part was gone. The court of King's Bench held, that Painton was not legal recorder, although he had been chosen when the corporation was full, because it was now *dissolved* (2). The parties acquiesced in this decision, and applied for a new charter.

[40]

In 1723, the mayor of the borough of Tiverton having absented himself on the charter-day for electing his successor, no new mayor could be

(1) Roll. Abridg. p. 514. let. I. (2) 10 Modern, p. 346:

chosen,

chosen. The year following the Crown was applied to for a new charter, and the business was referred to Sir Philip Yorke, and Sir Clement Wearg, then Attorney and Solicitor General, for their opinion. In their report, they state the foregoing case of Banbury, and, after observing that the decision there had not been contradicted by any subsequent opinion of the court where it was made, nor of any superior court, they say, "That they apprehend it
 [41] " comes up to the case before them, and is a clear
 " authority in law that the corporation of Tiverton
 " is at an end." They therefore advise the King to grant a new charter (E).

To prevent the inconvenience that attended the power which the presiding officers of corporations had of *dissolving* them, by keeping out of the way on the day appointed by their constitution for the election of magistrates, it was enacted by the statute of the 11th of George the First, cap. 4. " That *for the future* the corporation, in such cases, " shall *not be deemed or taken to be dissolved*;" and it is provided, that the persons entitled to choose the magistrates shall proceed to make the election on the day immediately following the charter-day, without the mayor or other presiding officer, and that the person next in office shall hold the court, and be the presiding officer for that purpose.

This statute is a legislative authority to show the general rule to be true, that when an integral part of a corporation is lost, and cannot be restored, the corporation itself is gone. Such a consequence is indeed

indeed prevented, as to the particular situation to which the statute applies a remedy; and if only the mayor had been gone in Helleston, since the statute, the corporation might have continued itself, and might have elected a new mayor. But there is no provision in the statute touching corporations which are reduced, to have no legal members sufficient to choose a mayor or other magistrates.

The borough of Maidstone, by a charter of James the First, was incorporated by the name of the "mayor, jurats, and commonalty of the town and parish of Maidstone." The mayor was to be elected out of the jurats, by their naming two, of whom the commonalty were to choose one. The jurats, by the mayor, jurats, and commonalty, out of the inhabitants. The freemen, by the mayor and jurats.

About the year 1742, a new charter was applied for, there being no mayor or legal jurat then existing. But there were five or six hundred freemen, and about two hundred of them opposed the new charter. Sir Dudley Ryder, and Sir John Strange, then Attorney and Solicitor General, to whom the matter was referred, after stating those facts in their report (29 April, 1742,) delivered their opinion, that the corporation was *dissolved*.

[43]

In 1763, application having been made for a new charter for the borough of Carmarthen, it was granted, and accepted by the individuals to whom it was tendered; but at the election in 1768,
twenty

twenty members of the old corporation, who, like the remaining eight in Helleston, had enjoyed their franchise for above twenty years, offered to poll under the old charter, and were rejected: and the House, upon a petition, Resolved, 8 March, 1770, "That they had no right to vote (1), (F)."

[44] The present charter is very different from that of Plympton, and others granted by James the Second. They were justly holden to be illegal, because, as has been already observed, they left the members of the corporation at the mercy of the Crown, and narrowed the right of election for members of Parliament, which the King has no power to do (2). The new charter of Helleston, on the contrary, extends that right by encreasing the number of voters, a power which has never been refused to the Crown, and is not so much as questioned by Lord Coke, when he lays it down that the right of election cannot be *restrained* by the King's prerogative (3).

The situation of Helleston called for a new charter, and the law officers, far from being reprehensible, did what it was their duty to do, when they advised the Crown to grant it. In granting it, the Crown proceeded with the utmost deliberation and circumspection, counsel having been heard no less than six times in the progress of the business. The alterations from the old charter are such as were

(1) Journ. vol. xxxii. p. 763. col. 2.

(2) Coke, 4 Inst. p. 48.

(3) 4 Inst. *loc. cit.*

highly

highly expedient, and *that* chiefly opposed was proved to be convenient by the constant usage of the borough ever since the first was granted.

If no new charter had been granted, the old corporators must, *ex necessitate*, have chosen and returned two burgesses to Parliament. But even in that case they could not have claimed a *legal* title to vote; for it is impossible that men not chosen agreeable to the old constitution should have a legal right to vote under it. Their votes *de facto* must have been allowed, merely that the representation of the nation in the House of Commons might not be defective (C). But now that absurdity is removed by the new charter.

The old corporators complain of that charter with an ill grace, since they are all thereby made members of the new corporation, when it was in the King's power to have left them all out of it.

If no charter can be valid but by *their* acceptance, the consequence will be, that those six men, and, when five of them are dead, the single one who survives, will send two members to Parliament.

—Such an absurdity cannot be the consequence of legal principles. [46]

If the new charter is illegal, why has not a *Scire facias* been sued out in order to repeal it by the regular course of law?

That the votes of members of the new corporation were not affected by the statute of the third of the present King, is clear from the *words* of that statute. The disqualification created by it, re-

gards persons *admitted* to their freedom within the year: a man never can be said to be admitted into what does not exist. Till those men were *made* freemen by the new charter, the corporation to which they belong had no existence; therefore they cannot be said to have been *admitted* into it.

[47] This is also clear from the spirit of the act. The occasion of passing it is well known. The magistrates of Durham had grossly abused their power of electing and *admitting* freemen; by pouring in about six hundred during an election for members of Parliament. The legislature meant to put a stop to such abuses for the future. But there was no complaint at that time of any abuse of the prerogative in creating freemen, to serve election purposes. It is impossible to suppose that the Parliament had any view to freemen *created by charter*.

What would be the consequence of the construction of the statute insisted upon on the part of the petitioners? Let us suppose the new charter to be void, and the sole survivor of the old corporators to die within a year before an election; will it be contended that, in such a case, there could be no members of Parliament chosen for Helleston under any new charter which the King could possibly grant.

COUNSEL for the petitioners, in reply.

To contend that the eight subsisting members of the old corporation were incapable of giving
legal

legal votes, is to say that, since the reign of Queen Elizabeth, no man has either given a legal vote, or been legally elected, for the borough of Helleston, because, since that time, there have been no freemen who had any other title, but what *they* [48] have, to their franchise.

But there has been no judgment of a court of law against them. An attempt was made to obtain such a judgment against one, but without success; and the House, when the votes of persons have been objected to, whom they found in the open avowed possession of their franchise, have always enquired, whether their title has been questioned at law, and if it has not, when there had been an opportunity, or, having been questioned, if the attempt has failed, they have never suffered it to be impeached before them.

The case of the corporation of Colchester *v.* Seaber, is directly in point to show that that of Helleston was not dissolved. The question which in that case was directly before the Court was, whether the corporation was dissolved or not; and the court held that the Crown had only given new integral parts to a corporation *actually subsisting*, in order to revive it and give it vigour; and it is stated, that what gave it that vigour was the *acceptance* of the new charter. This shows that it might [49] have been refused.

It has been thrown out that this case was not warranted by those which were cited on the side on which the decision was given; but this will not

appear probable to those who consider who the counsel, and who the judges were. And it is remarkable that the cases of Banbury and Maidstone, which on the present occasion have been cited as against the principle of the Colchester case, were, in that very case cited by Mr. Justice Wilmot as entirely consonant to it.

The words in the recital of the new charter were not inserted through any slip or inaccuracy, but after the former words had been proposed, and the matter argued by counsel. The charter itself is, therefore, an authority, it is the authority of the Attorney and Solicitor General, to shew that there was a corporation actually subsisting; and, if so, it seems to be admitted that their acceptance was necessary to give validity to the charter.

[50]

As to the report of the law-officers, in the case of Tiverton, which by the bye was no judicial determination, it appears by the conclusion, that they recommended the granting a new charter, because “ *if the corporation was dissolved*, they conceived no-
“ thing but a new charter could restore it, and *if*
“ *it was not dissolved*, the new charter would not de-
“ prive any person of the rights he might claim
“ under the old corporation, or prevent any legal
“ enquiry whether the old corporation was dis-
“ solved or not.” (E) The point, therefore, was not then decided, and it has been, since, in the case of Colchester.

The purpose of appointing the new corporators by name, can have been no other but to take them
out

out of the operation of the statute of George the Third. But for the reasons already given, they are still within the meaning and spirit of that statute. A certain proof that the word "*admitted*," is not there used in a limited technical sense is this; that in the very same sentence, the same word is used with regard to persons received to vote at an election: "No freeman shall be *admitted* to vote at any election, &c. unless such person shall have been *admitted* to his freedom twelve calendar months, &c." If the legislature had in that statute affixed any strict technical idea to the word, they would not, in the same breath, have used it both in its technical and popular sense. The case of Carmarthen is not at all parallel to this. Several of the twenty old corporators had joined in the petition for the new charter for that borough, and none of them had claimed to act as burgessees under the old one, from 1758 till 1768. The new charter was *accepted* by *all* the persons named in it, and till the last mentioned year, it had never been objected to. The House, therefore, thought justly, that it was then too late to listen to any complaint against it by men at whose request it had been granted. (F).

[51]

On Tuesday, the 14th of March, the Committee, by their Chairman, informed the House, that they had determined,

[52]

That Philip Yorke, Esq. and Francis Cust, Esq. the petitioners, were duly elected, and ought to have been returned,

Accordingly the order was made which is usual in cases of single returns, when the determination is in favour of the petitioners, *viz.*

“ Ordered that the deputy clerk of the crown do attend this House (to-morrow morning) with the last return for the borough of Helleston, in the county of Cornwall; and amend the same. by rasing out the names of the Right Hon. Francis Godolphin Osborne, commonly called Marquis of Carmarthen, and Francis Owen, Esq. and inserting the names of Philip Yorke, and Francis Cust, Esquires, instead thereof (1).”

[58] But the next day when the deputy clerk of the crown attended according to the above order, Sir John Hynde Cotton, the Chairman of the Committee, acquainted the House, that the return upon which they had determined, was not *that* then in the hands of the clerk of the crown, but was an indenture of return executed by Richard Johns, alderman of the said borough, and several other persons, and which had been by the said Richard Johns tendered to the sheriff of the county, but had not been by him annexed to the writ for the said county, and that the said return had been produced to the Committee by the sheriff of the county. He then delivered Johns' return in at the table, and the order for altering the other being discharged, a new order was made,

(1) Votes p. 366.

“ That

“ That the deputy clerk of the crown do amend
“ the said return, by taking off the file the inden-
“ ture of return annexed to the writ for the coun-
“ ty of Cornwall, and by annexing thereto the in-
“ denture of return, executed by the said Richard
“ Johns and others, and now delivered in at the
“ table.”

And this was done accordingly (1).

(1) *Votes*, p. 369, 370.

N O T E S

ON THE CASE OF

H E L L E S T O N.

Note
(A)

PAGE 10. (A). The following were the additions and alterations proposed to be made in the new charter.

1. That there be a deputy mayor, to be nominated by the mayor out of the aldermen, and to act, in his sickness or absence from the borough, in like manner as the mayor could do if present.

2. That there be a deputy recorder, as well as town clerk, to be nominated by the recorder for the time being, to act in his sickness or absence from the borough, in like manner as the recorder could if present.

3. That the recorder, or his deputy, have a voice in all elections and corporate meetings, and take place next to the mayor.

4. That all the aldermen, and the deputy recorder, be justices of peace for the borough, and that the county justices, who have never acted within the borough, be expressly excluded from acting therein.

[55]

5. That in all assemblies, or meetings for the elections of mayor, aldermen, recorder, and freemen, and in all acts to be done by the mayor, recorder, and aldermen, or the major part of them, the mayor, or, in his absence, his deputy shall, when the voices are equal, have a casting vote; and that, upon the death of a mayor, the recorder, or, in his absence, his deputy, shall have a casting vote in the election of a new mayor, when the voices are equal.

6. That the freemen who, notwithstanding the charter, have by the usage of the borough been excluded from voting in

Notes on the Case of Helleston.

55

in the election of new freemen, be expressly excluded by the new charter.

Note
(A)

7. That the aldermen continue for life, unless removed for reasonable cause.

8. That a competent number of fit persons be nominated and appointed by the charter to be freemen of the borough.

P. 12. (B.) The report of the Attorney and Solicitor General on this occasion was,

Note
(B)

“ That they had been attended by counsel on the part of
“ the petitioner, and also on the part of the remaining alder-
“ men and six of the remaining burgesses of the said borough,
“ and that they submitted to their Lordships, that it was
“ their opinion, that it would be expedient and just for his
“ Majesty to grant a new charter of incorporation to the
“ said borough, upon the general plan of the charter of
“ Queen Elizabeth, with some of the additions and variations
“ which had been proposed to their Lordships, particularly
“ the two first.

“ That the third contained an innovation in the form of
“ the constitution, which, having been objected to, they did
“ not think of sufficient consequence to be adopted.

[56]

“ That they recommended the 4th proposal to their Lord-
“ ships, except so far as it purported to exclude the justices
“ of the peace for the county at large, for that the rest of it
“ was but a small, and that a convenient addition to the
“ charter of the 10th of Charles the First.

“ That they had made some slight alterations in the 5th
“ proposal, to answer the purposes of it more completely,
“ and proposed it to be as follows :

“ That, in assemblies or meetings for the election of
“ mayor, aldermen, recorder, and freemen, and in all acts
“ to be done by the mayor and aldermen, or the major part
“ of them, where the voices are equal, the mayor, or, in his
“ absence, his deputy, shall have the casting vote : and that,
“ upon the death of a mayor, the person who last served the
“ office

Note
(B)

" office of mayor present at such election shall have the
" casting vote in the election of a new mayor, if the voices
" be equal.

[57]

" That the 6th proposal, though it had been strongly op-
" posed, they thought fit to be adopted, as it provided a
" method of election which had been constantly practised in
" the place, though not suitable to the legal construction which
" had, at length, been put upon the old charter.—That the
" old charter being now removed, it seemed most expedient
" to give the sanction of law to the custom of the place.

" That they thought the 7th proposal very reasonable;
" and *that the 8th was of course.*"

[In the charter of Queen Elizabeth, only the mayor
and aldermen were specifically appointed. There was prob-
ably a considerable number of old freemen existing at the
time.]

Note
(C)

• P. 20, 31, 45. (C.) It would seem that there are two
very different ways in which a man may exercise the fran-
chise of a corporator.

1. He may, as a member of the corporation, concur in
the joint act of the aggregate body. Such joint or *corporate*
acts as require the concurrence of all the essential *integral*
parts of the whole cannot be performed, when any of those
integral parts are lost. Of this sort are, The taking or
granting lands, bringing or defending actions, and so forth.

Whether the acceptance or refusal of a new charter, so as
either to complete its validity, or to make it void, are such
acts as have just been described, and require that the cor-
poration should possess all its necessary *integral* parts, or
whether they may not be done by the major part of the re-
maining individual members of an imperfect and mutilated
corporation, was one of the questions agitated in this case.

[58]

2. A corporator may severally and *individually* do acts,
and enjoy privileges, which, however, he is only entitled to
do, or enjoy, as being a member of an aggregate body. Of
this

this sort are, The voting for a member of Parliament, exercising a right of common, and many others which might be mentioned. "It is no new thing," (says Lord Holt, speaking of a corporator's right of voting for a member of Parliament) "but agreeable to the rules of law, that a franchise should be vested in the congregation aggregate, and the benefit of it to redound to the *particular* members, and to be enjoyed by them in their *private capacity*." (Lord Raym. p. 952.)

Nct:
(C)

According to the doctrine in the case of the corporation of Colchester against Seaber, acts and privileges of this sort may be done or enjoyed by the individual members of a corporation, although the aggregate body has lost some of its essential integral parts. This was the other main question on the first point in this case. We must conclude from the event of the cause that the Committee decided on the *first* point, and adopted the doctrine contended for by the counsel for the petitioners, because they considered the legal return to be that which Johns made. If they had thought that the only thing that vitiated the votes of the new corporators was their being made within the year, still the return by Rogers would have been the legal return, and as the six old corporators voted at his poll (though under a protest), their six votes being (on such a supposition) the only good ones on that poll, his return would have been amended according to the first order made by the House for that purpose.

P. 38. (D.) A gentleman*, who was the leading counsel on one side, in that case, has favoured me with the following note of it.

[59]
Note
(D)

THE KING against the MAYOR and ALDERMEN of COLCHESTER. Trin. 14 Geo. III. 1774.

Upon a rule to shew cause why a *mandamus* should not go to the mayor and aldermen of Colchester, to proceed to

* Mr. Wallace, afterwards Attorney General.

an

Note
(D)

an election of 48 persons duly qualified under the act of the 9th and 10th of William the Third, to be *guardians of the poor* of the said town, the case was this :

By the statute referred to, a corporation was created, consisting of the mayor and aldermen of Colchester for the time being, and of 48 other persons, guardians of the poor, to be chosen in a manner prescribed, for the purposes of assessing and levying the poor rates in the town of Colchester, building hospitals, workhouses, &c.

By the provisions of the act, the first 48 guardians were to be chosen at once, 12 out of the inhabitants of a certain description within each of the four wards into which the town is divided. The six of each twelve who were *first* elected for every several ward were to cease to be of the corporation at the end of two years, and six others to be chosen in their room by the inhabitants of the respective wards, at a meeting to be holden *by the mayor and aldermen* for that purpose ; that is, 24 new guardians were to be chosen every second year for the whole town, and all the 48 to be changed every four years.

[60]

Informations in the nature of *quo warranto* having been exhibited, about the year 1740, against the then mayor and aldermen, and judgments of ouster obtained thereon, there ceased to be any mayor or aldermen, and there could be none chosen agreeable to the charter. The consequence of this was, that there could be no meeting holden for the election of new guardians according to the regulations of the act of King William ; neither could the remaining guardians hold any meetings for dispatching the business of the corporation, for they too were, by the act, directed to be holden by the mayor and aldermen. To remedy these inconveniences, a temporary act passed in 1742, (15 Geo. II.) empowering certain governors of a charity, who were also chosen under the statute of King William, to hold the meetings for the management of the business of the corporation, and appoint-
ing

ing 12 persons *nominatim* to officiate in the room of the mayor and aldermen, during the continuance of this temporary act, or till the King should be pleased to re-incorporate the town, and no longer. This act expired some time in 1745, and from that time the poor-rates were assessed, levied, and disposed of, by parochial overseers, appointed by the justices of the peace for the county, according to the general law established by the statute of Queen Elizabeth (1). In 1763, the King granted a new charter, which revived the corporation of the borough with its former constitution. The poor-rate however continued to be under the management of parochial overseers, with this difference, that those overseers were now nominated by corporation justices appointed under the charter. There had been no election of guardians of the poor under the statute of King William, since 1742, and the corporation created by that statute had entirely ceased from acting since 1745, so that for a long time there had not been one of the 48 guardians existing.

Note
(D)

[61]

The *mandamus* was now applied for to compel the mayor and aldermen, (under the new charter of 1763) to hold a meeting for the election of 48 guardians, according to the statute of William the Third.

On the part of those who made the application, (besides arguments of convenience and policy, drawn from opinions of persons living at Colchester, declared in their affidavits) the case of the corporation of Colchester and Seaber was much relied on, as proving that the mayor and aldermen were now to be considered as holding their offices under the old charter of the town, which had only been *revived* by that of 1763. This being the case, it was said that they were internal parts of the corporation created by the statute

(1) 43 Eliz. cap. 2.

Note
(D)

of King William, and competent to hold a meeting for the election of the 48 guardians.

[62]

On the other side, (besides the arguments of expediency also) it was said, among other things, that by the statute of William the Third, a power of choosing 48 *all at one time* was only given for *once* after the creation of the corporation; that such power had been exercised, and was now gone.

Lord MANSFIELD.

“ The policy of the act is not open to discussion. If it were, I am of opinion that it is better to have a large district than a small one.

“ My great difficulty is, whether we can grant a *mandamus* to *revive* the corporation. But it seems to me to be *dissolved*. I consider the mayor and aldermen as one integral part, and the 48 as another integral part. The 48 must be supposed all gone. The rest of the corporation created by the temporary law is also gone; so there is not a single member left.

“ Whether the revival of the corporation of the borough extends to this power of choosing the guardians members of the other corporation, is a question very different from the question in Seaber’s case. The temporary act of George the Second seems to suppose it would extend to *that* when it should take place. I shall not go upon that.

“ I do not remember any instance of a *mandamus* for an integral part.”

Mr. J. ASTON.

“ There is no instance of a *mandamus* to restore an integral part. A *mandamus* is discretionary, and the court will not grant it in such case.”

[63]

‘ *Nota*. The court was of opinion they could not grant a *mandamus* or a whole integral part, and that the corporation, which was to consist of two integral parts, by the
‘ *dissol-*

' dissolution of one of these, was itself dissolved. But if the
' law were otherwise, yet, as the *mandamus* is discretionary,
' the court would not, under the present circumstances, grant
' it, as it would introduce so much confusion.'

Note
(D)

P. 41, 50. (E). [The Report of Sir Philip Yorke and
Sir C. Wearg, the Attorney and Solicitor General, in the
case of Tiverton.

Note
(E)

" To the King's Most Excellent Majesty ;

" May it please your Majesty,

" In humble obedience to an order of their excellencies
" the late lord Justices, made in council the 19th day of
" September last, whereby we were commanded to examine
" the annexed petition of Roger Chamberlain, John Up-
" cott, William Upcott, George Davy senior, George
" Davy junior, and John Tristram ; six of the capital bur-
" gesses of the corporation of the town and parish of Tiver-
" ton, in the county of Devon ; and of William Upcott
" junior, Daniel Woodward, Clement Govett, Caleb Ing-
" lett, Charles Plympton, and William Frost ; six of the
" assistants of the said town and corporation ; and to report
" to their said excellencies in council, what we conceived
" proper to be done therein : And also in humble obedience
" to one other order made by their excellencies in council,
" on the 14th Day of November last, referring to us the
" annexed petition of Samuel Burrridge, Esq. Oliver Peard,
" Esq. Peter Atkins, Esq. Nathaniel Thorne, Esq. Peter
" Bartowe, Leonard Beagdon, William Hewlett, William
" Burrridge, John Norman, Robert Dunsford, and John
" Maunder, Gentlemen, and others, the inhabitants of the
" ancient town, borough, and parish of Tiverton, in the
" county of Devon ; and commanding us to examine the
" same, and report to their excellencies our opinion there-
" upon ; and also in humble obedience to another order
" made

Note
(E)

“ made by their excellencies in council, on the said 14th of
 “ November, whereby we were commanded to examine
 “ the annexed petition of the capital burgeses and assistants,
 “ together with the burgeses inhabiting the town and parish
 “ of Tiverton in Devon, and report our opinion thereupon,
 “ to their said excellencies in council; and also in humble
 “ obedience to one other order made by their excellencies in
 “ council on the 5th day of December last, whereby we were
 “ commanded to examine the annexed petition of Samuel
 “ Burridge, Esq. Oliver Peard, Esq. Nathaniel Thorne, Esq.
 “ Peter Barlowe, Leonard Blagdon, William Hewett, Wil-
 “ liam Burridge, John Norman, Robert Dunsford, and John
 “ Maunder, Gentlemen, and others, the inhabitants of the
 “ ancient town, borough, and parish of Tiverton in the
 “ county of Devon; and to report our opinion to their said
 “ excellencies in council; we have considered the said
 “ several Petitions, the first whereof sets forth,

“ That King James the First, in the thirteenth year of
 “ his reign, granted a charter to the said town and parish of
 “ Tiverton, whereby he incorporated the same by the name
 “ of the mayor and burgeses, and that the same was to
 “ consist of a mayor, twelve capital burgeses, and twelve
 “ assistants; the mayor to be chosen out of the twelve capi-
 “ tal burgeses yearly and every year, on Tuesday next after
 “ the Feast of St. Bartholemew, between the hours of nine
 “ and twelve in the forenoon, by the said mayor, capital
 “ burgeses, and assistants of the said town and parish of
 “ Tiverton, for the time being, or the greatest part of them;
 “ and that the said mayor, so chosen, should be sworn on
 “ Tuesday fortnight after the said day of election, and should
 “ continue in his said office of mayor for the space of one
 “ year, next after he should have taken the said oath of
 “ office.

“ That Tuesday the twenty-seventh of August last was
 “ the day whereon, by the said charter, the election of a
 “ mayor

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“ mayor ought to have been made, at which time there hap-
“ pened to be two vacancies in the said capital burgesſes and
“ aſſiſtants, and thereby the petitioners, being twelve in num-
“ ber, became the majority of the ſaid capital burgesſes and
“ aſſiſtants.

Note
(E)

“ That, in obedience to the ſaid charter, and in reſpect to
“ Samuel Burrige, Eſq. then mayor of the ſaid town, the
“ petitioners did go to the ſaid mayor’s dwelling houſe in the
“ ſaid town, on the ſaid Tueſday the twenty-ſeventh day of
“ Auguſt laſt, in order to attend upon him to the common
“ Town-hall (the uſual place of ſuch election) and to proceed
“ there to the choice of a mayor of the ſaid town, for the year
“ enſuing, where, finding Mr. William Burrige, brother and
“ ſervant of the ſaid mayor in the ſaid houſe, and a member of
“ the ſaid corporation, the petitioners enquired of him the
“ ſaid William Burrige for the ſaid mayor, who answered,
“ that he the ſaid William Burrige was not obliged to tell,
“ and did not know when the ſaid mayor would return
“ until he ſaw him; that then the petitioners asked for
“ the key of the Town-hall, and where it was, and were
“ answered by the ſaid William Burrige that he could not
“ tell.

“ That the petitioners went immediately to the common
“ Town-hall, and found the door thereof locked or bolted,
“ and remaining in the paſſage next and before the door of
“ the ſaid hall, before eleven of the clock in the forenoon of
“ the ſame day Mr. John Richards, deputy town-clerk of
“ the ſaid corporation, did then and there produce a paper,
“ containing the names of the ſaid mayor, and of all the
“ capital burgesſes and aſſiſtants, and did twice read and
“ call over their ſaid names; and all the petitioners then
“ and there answering to their names, the ſaid mayor and
“ the reſt of the ſaid capital burgesſes and aſſiſtants being
“ abſent, the petitioners being the majority of the ſaid elec-
“ tors of a mayor, did, between the hours of eleven and
“ twelve

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“ twelve o'clock of the forenoon of the same day, there proceeded to the choice of a mayor for the year ensuing; and unanimously voted, nominated, and elected the petitioner John Tristram, one of the capital burgessees of the said corporation, mayor of the said town and parish for the year ensuing, though the petitioners were advised such election was not of force by reason of the absence of the then mayor.

“ That the said Samuel Burridge, the then mayor, did not appear at any time during the said election, nor was any message or excuse brought from the said mayor, although some of the petitioners did attend there till long after twelve o'clock in the same forenoon; nor did the said Samuel Burridge (as the petitioners could discover or find) appear at the said hall at any time before twelve that day, or after, or proceed in any manner to any election of a succeeding mayor.

“ That the said mayor did the day next before the said day of election, cause the public chest, wherein were kept the charters, records, and other writings belonging to the said corporation, to be removed out of and from the Town-hall (where the same were always kept) and carried the same to his the said mayor's own house in Tiverton aforesaid, where the same then remained (as the petitioners believed); and about seven o'clock in the evening, before the said day of election, the said mayor did ride out of the said town in good health, and was absent the said whole day of election, and wilfully deserted the execution of his office, as the petitioners believed.

“ That the said mayor, shortly before the said day of election, endeavoured by large sums of money and other gratuities to engage several of the petitioners to vote in the choice of a mayor, and of a capital burgessees and assistant then vacant, as he the said mayor should direct.

“ That by the said illegal and arbitrary neglects and acts of the said mayor, in contempt of his oath of office, the

“ said

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“ said corporation is notoriously injured and aggrieved,
“ and all justice is obstructed in the said town and parish,
“ which is of large extent and very populous, and exempt
“ from the jurisdiction of the justices of the peace for the said
“ county at large; and unless timely relieved by their said
“ excellencies, would tend to the utter ruin of the said cor-
“ poration, there being no clause in the said charter for the
“ mayor to continue after his year of office.

Note

[E]

“ The petitioners therefore humbly prayed their excel-
“ lencies, that the hardships of the petitioners case being
“ considered, their excellencies would be pleased to order
“ a writ to issue under the great seal, to authorize and com-
“ mand the capital burgeses and assistants of the said corpo-
“ ration, to proceed to elect a new mayor for the said corpo-
“ ration (as had been done in cases of like nature in other
“ corporations) or that their excellencies would give such
“ orders therein as to their wisdom should seem fitting.

“ The petition of Samuel Burridge, Esq. Oliver Peard,
“ Esq. Peter Atkins, Esq. Nathaniel Thorne, Esq. Peter
“ Bartowe, Leonard Blagdon, William Hewett, William
“ Burridge, John Norman, Robert Dunsford, and John
“ Maunder, gentlemen, and others, the inhabitants of the
“ ancient town, borough, and parish of Tiverton, in the
“ county of Devon, sets forth, That his late Majesty King
“ James the First, by his letters patents under the great
“ seal of Great Britain, bearing date the tenth day of
“ August, in the thirteenth year of his reign, did incorporate
“ the inhabitants of the said town and parish by the name of
“ mayor and burgeses; consisting of a mayor, twelve capi-
“ tal burgeses, and twelve assistant burgeses; and did, by
“ the said letters patents, constitute Richard Hill alias
“ Spurway, to be the first mayor of the said town and parish,
“ willing that he should be and remain in the office of
“ mayoralty from the date of the said letters patents, until
“ the Tuesday next after the feast of St. Bartholomew then

“ next

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“ next following, and from thence until another capital
“ burgesſs ſhould be choſen to the ſame office; and did
“ thereby direct that if the mayor for the time being ſhould
“ happen to die, or be removed from his office, that then
“ and ſo often it ſhould and might be lawful for the capital
“ burgeſſes and aſſiſtants for the time being, or the major
“ part of them, to chooſe one other of the capital burgeſſes
“ to be mayor, and that he ſo choſen, ſhould exerciſe the
“ ſaid office during the reſidue of the year, and until another
“ ſhould be rightfully and lawfully choſen to the office of
“ mayor; and did, by the ſaid letters patents, alſo direct that
“ annually, upon the Tueſday next after the feaſt of St-
“ Bartholomew, the mayor, capital burgeſſes, and aſſiſtants,
“ or the major part of them for the time being, might and
“ ſhould have power and authority to chooſe and nominate
“ one of the capital burgeſſes to be mayor, which perſon ſo
“ elected, was to be ſworn into the ſaid office on Tueſday
“ fortnight next after ſuch his election; and the oath of
“ office which he then took is to the effect following:
“ That he ſhould well and truly ſerve the King’s Maſteſty
“ in the office of mayoralty, and as mayor for and during
“ the ſpace of one whole year thence next following, and
“ until another ſhould be lawfully ſworn.

“ That upon the twenty-eighth day of Auguſt 1722,
“ the petitioner Samuel Burridge, then one of the ſaid
“ capital burgeſſes, was duly elected, and upon the eleventh
“ day of September then next following, was ſworn into the
“ ſaid office of mayor, by taking the oath aforeſaid, which
“ ſaid office was duly executed by him until the tenth day
“ of September laſt, about which time the ſaid Samuel Bur-
“ ridge was then informed that ſeveral illegal and arbitrary
“ deſigns had been framed among certain numbers of the
“ ſaid corporate body and others, and particularly to carry
“ away by force and violence at or before the election of a
“ mayor, the charter and writings belonging to the ſaid
“ corporation;

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" corporation; and that for the executing of such designs,
" and to support one the other therein, they bound them-
" selves to each other by pecuniary as well as religious
" ties, as by proper affidavits will be made appear. But for
" the avoiding thereof, and the ill consequences which might
" have ensued thereon, the said Samuel Burrridge did not
" attend on the twenty-seventh day of August last, being
" the day appointed for the election of a mayor, not appre-
" hending that any inconvenience could happen to the cor-
" poration by such his non-attendance, but he might have
" held over until another mayor could be freely and duly
" elected, in regard that the oath which he took at the
" entrance into his office, required him to exercise his
" office until another should be lawfully sworn, and some of
" his predecessors in the said office had held over after the
" expiration of their year.

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" That the petitioners had been since informed and ad-
" vised, that, by the terms of the said letters patents, no
" mayor can exercise his office for any longer time than one
" year, and hath no legal authority to hold over for another
" year; so that the said Samuel Burrridge, or any other per-
" son not being elected into the said office of mayor upon
" the twenty-seventh day of August last, there was not any
" legal mayor then in being, nor could any mayor of the
" said borough be thereafter duly elected, and that such
" others of the petitioners as were capital burgessees and
" assistant burgessees of the said corporation, could no lon-
" ger execute their offices, for that the body corporate,
" erected by the said letters patents, was (as the petitioners
" were advised) dissolved, and the powers, liberties, and
" franchises thereby granted, were lost and extinguished, to
" the great damage and confusion of the inhabitants of the
" said town and parish, which is very populous, and greatly
" concerned in carrying on the woollen manufactory, and
" that the same cannot be restored or continued without the

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“ interposition of your Majesty’s most gracious bounty and
“ favour towards the inhabitants of the said town and
“ parish.

“ In consideration whereof, the petitioners humbly pray-
“ ed, that their excellencies would be graciously pleased to
“ grant and restore to the inhabitants of your Majesty’s
“ said ancient borough, town, and parish of Tiverton, the
“ powers, liberties, and franchises enjoyed by them under
“ the said letters patents, by granting your Majesty’s most
“ gracious letters patents of incorporation and restoration,
“ with such powers and clauses, and in such manner, as to
“ their excellencies great wisdom should seem meet.

“ The petition of the capital burgesses and assistants, to-
“ gether with the burgesses inhabiting the town and parish
“ of Tiverton in Devon, sets forth, That King James the
“ First, in the thirteenth year of his reign, granted a charter
“ to the said town and parish, whereby he incorporated the
“ same, and out of the burgesses were to be chosen a mayor,
“ twelve capital burgesses, and twelve assistants, and or-
“ dained that there should be a new mayor annually chosen
“ out of the twelve capital burgesses, on Tuesday next after
“ the feast of St. Bartholomew, by the mayor, capital bur-
“ gesses, and assistants, or the major part of them.

“ That on the said charter day of election for the year
“ 1723, and at the accustomed hours, the major part of the
“ capital burgesses and assistants did meet at or before the
“ usual place of election, in obedience to the said charter,
“ and elected a mayor, though the petitioners were advised
“ such election was not of force, by reason of the absence of
“ the late mayor.

“ That the petitioners have been ever zealous for the
“ support of the present government as established in your
“ Majesty’s royal family, and have done nothing whereby
“ the said ancient charter might be deemed forfeited, and
“ therefore they humbly prayed that their said excellencies
“ would

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“ would be pleased to continue the same, and issue a writ
“ under the great seal, to authorize and command the capital burgessees and assistants to proceed to elect a new mayor,
“ or that their excellencies would give such orders for
“ the preservation of their said ancient charter, and for the
“ establishment of the government of the town, as to their
“ wisdom should seem fitting.

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(E)

“ The other petition of Samuel Burridge, Esq. Oliver
“ Peard, Esq. Nathaniel Thorne, Esq. Peter Bartowe, Leonard Blagdon, William Hewett, William Burridge, John
“ Norman, Robert Dursford, and John Maunder, gentlemen,
“ and others, inhabitants of the ancient town, borough, and
“ the parish of Tiverton in the county of Devon, humbly
“ prayed that their excellencies would be graciously pleased
“ to grant and restore to the inhabitants of your Majesty’s
“ said ancient borough, town, and parish of Tiverton, the powers, liberties, and franchises enjoyed by them
“ under the said letters patents, by granting your Majesty’s
“ most gracious letters patents of incorporation and restoration to the late members of the said corporation, inhabiting within the same, according to the ancient usage
“ and practice thereof, together with such other powers and
“ clauses, and in such manner as to their said excellencies
“ great wisdom should seem meet.

“ And we most humbly certify your Majesty that we
“ have been attended by the agents of the several petitioners, and have heard council on both sides, and upon
“ such attendance several facts were agreed by the council
“ for the respective parties, viz.

“ That King James the First, on the tenth day of August,
“ in the thirteenth year of his reign, granted a charter to
“ the inhabitants of the said town and parish of Tiverton,
“ (being the only charter under which they appear to have
“ acted) whereby he incorporated them by the name of
“ mayor and burgessees, to consist of a mayor, twelve capital
“ burgessees,

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“ burgesſes, and twelve aſſiſtants; the mayor to be choſen
“ out of the capital burgesſes yearly, on the Tueſday next
“ after the feaſt of St. Bartholomew, by the ſaid mayor, ca-
“ pital burgesſes, and aſſiſtants for the time being, or the
“ major part of them. That the mayor ſo choſen ſhould be
“ ſworn on the Tueſday fortnight after his election, and con-
“ tinue in his office for the ſpace of one year next after he
“ ſhould have taken the ſaid oath.

“ That upon the twenty-eighth of Auguſt, one thouſand
“ ſeven hundred and twenty-two, being the charter day for
“ electing a mayor, Mr. Samnel Burridge was duly elected
“ mayor of the ſaid corporation, and on the eleventh of
“ September following regularly ſworn into the ſaid office.

“ That on the twenty ſeventh day of Auguſt, one thouſand
“ ſeven hundred and twenty-three, being the charter day for
“ electing a mayor for the year enſuing, a majority of the
“ capital burgesſes and aſſiſtants did at the uſual time af-
“ ſemble before the Town-hall, the door then being locked,
“ and did then and there in the abſence of Mr. Burridge, the
“ then mayor, give their votes for Mr. John Triſtram to
“ be mayor for the year enſuing; but that Mr. Triſtram
“ was not ſworn into the office of mayor, nor any other per-
“ ſon elected to be mayor.

“ The council on both ſides likewiſe admitted, that the
“ election of Mr. Triſtram to be mayor in the abſence of
“ Mr. Burridge, then mayor, was void. And although
“ ſome of the petitioners in the firſt and third petition had,
“ in Hilary Term laſt, obtained a rule of your Maſteſty's
“ court of King's Bench for a mandamus to ſwear the ſaid
“ Triſtram into the office of mayor, yet their agents and
“ council declared they had not nor did intend to ſue out
“ ſuch writ, or proceed upon the ſaid rule.

“ It was likewiſe admitted by the council on both ſides, that
“ the conſequence of not proceeding to an election upon the
“ charter day, one thouſand ſeven hundred and twenty-three

“ was,

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" was, that there not being any head of the corporation, the
" other members could not do any corporate act whatsoever,
" either for the administration of justice, preservation of their
" rights, or to answer any of the purposes for which they
" were incorporated, but were in a state of inability to act,
" and must for ever continue so, without the assistance of
" your Majesty's favour in some method or other.

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" These points being admitted by both sides, the council
" for the petitioners in the second and fourth petition insisted,
" that the corporation was dissolved, and that nothing but a
" new charter could restore them to their corporate capa-
" city.

" In maintenance whereof they urged the following ar-
" guments :

" That this corporation was a political body, created by
" charter, upon which charter the terms and conditions of its
" being did depend.

" That by the charter of the thirteenth of King James
" the First, a mayor was an essential integral part of this cor-
" poration.

" That without a mayor, or a capacity in the rest of the
" members to elect one, it ceases to be the same body created
" by the charter, and having no other support but the char-
" ter it must be dissolved, and nothing but a new charter
" can create them *de novo*.

" They relied upon the case of Mr. Painton late recorder
" of Banbury, which was adjudged in your Majesty's court
" of King's Bench in Michaelmas Term, one thousand
" seven hundred and seventeen, in which case an information
" was exhibited against the defendant for exercising the of-
" fice of recorder of Banbury ; and upon the pleadings it ap-
" peared, that the inhabitants of Banbury had been incorpo-
" rated by a charter of the thirteenth of King James the First,
" which directed the mayor to be annually elected on a cer-
" tain day, to continue for a year without any power given
" for

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(E)

“ for holding over, and that upon the charter day, one thousand seven hundred and fifteen, they had neglected to choose a mayor, whereupon the court of King’s Bench were of opinion that the body, being reduced to an absolute incapacity of acting as a corporation in any respect whatsoever, was dissolved, and consequently if there was no corporation Mr. Painton could no longer be recorder, for which reason judgment was given against him.

“ By way of objection to what was prayed by the petitioners in the first petition, it was insisted that a mandatory writ is liable to many objections, unless it is considered as a new charter, in which case it amounts to the same thing as is prayed by the petitioners in the second petition, only done in an improper form.

“ That it is impossible such a writ, considered as a writ, can be executed or have any effect. If it is directed to the mayor and burgesses, it cannot be executed, because there is no mayor, and it cannot be directed to the burgesses only, or to the capital burgesses and assistants, because there never was any such corporation created, and every writ must be directed to and executed by some natural or politic body.

“ That although some few late instances of writs of this sort are to be found, yet they never have been established by any judicial determination, but as often as they have been mentioned in the courts of Westminster Hall, the judges there have spoke of them as being liable to very great objections, and expressed great doubt concerning them.

“ Whereas a new charter will place the corporation upon a firm, sure foundation, and is therefore, even supposing the case to be doubtful only, the most eligible method:

“ They likewise laid before us the state of the corporation as it stood at the time of the petition, and alledged that the office of one capital burgess and one assistant was
“ vacant.

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“ vacant. That by the charter the capital burgeses and
“ assistants must be elected out of the inhabitants of the
“ town, and if a capital burges, or an assistant removed out
“ of the town, he might for that reason be removed from his
“ office. That Mr. William Upcot junior, who acted as
“ one of the assistants, was an inhabitant at the time when
“ he was elected an assistant, but had since his election re-
“ moved out of the town of Tiverton, and was settled at
“ Exeter, about fifteen miles distant from Tiverton.

Note
(B)

“ In support of which several matters, they insisted on the
“ following clauses in the charter of the thirteenth of King
“ James the First, viz.

“ Et ulterius volumus ac per p'sentes p'nobis heres et
“ successor unis concedimus prefect major et burgen' vill' et
“ paroch' p'd et successor suis qd quodocunque contigerit
“ aliquem vel aliquos de capital' burgens' vill' et par.ch' p'd
“ superius in presentibus norat aut aliquo tempore in posterum
“ no'and' vel eligend' obeii vel ab officio ill' amoveri vel
“ decedere (quos quidem capital' burgens' et eor' aliq'm vel
“ aliquos in offic' ill' se non bene geren' vel gerentes aut p'
“ aliqua' al' causa r'onabit amobilem et amobiles esse volu-
“ mus ad bene plitum major' et ceteror' capital' burgens' et
“ assisten' vill' et paroch' p'd p' tempore existen' vel major
“ partis eorundem quorum major p' tempore existen' semper
“ unum esse volumus) quod tunc et toties bene liceat et lice-
“ bit majori et reliquis capital' burgens' et assisten' existen'
“ coe consiliu' vill' et paroch' p'd vel major part eodem (quo
“ major' p' tempore existen' unum esse volumus) unum al'
“ vel plur' al' de assisten' vill' et paroch' p'd in locu' five loca
“ ipsius capital' burgens vel ipor capital burgens sic mori
“ amoveri vel decidere contingen' vel contingen' eligere
“ no'iare et p'ficere.

“ Et quodocunque contigerit aliquem vel aliquos de
“ assisten' vill' et paroch' p'd supius in presentibus no'iat aut
“ aliquo tempore in postem eligend' vel no'and' obeii vel ab
“ offic'

Notes on the Case of Helleston.

Note
(E)

“ offic’ ill’ amoveri vel decedere quos quidem assisten’ aut
“ eor aliquem vel aliquos in offic ill’ se non bene geren’ vel
“ gerentes aut p’ aliqua al’ causa rationobil’ amobil’ et amo-
“ biles esse volumus ad bene plitum major’ capital’ burgens
“ et ceteror’ assisten vill’ et paroch’ p’d p’ tempore existen’
“ vel majoris partis eorundem (quo major’ p’ tempore
“ existen semper unum esse volumus) q’d tunc et toties
“ bene liceat et licebit major’ capital’ burgen’ et reliquis
“ assisten’ existen’ com’un consil’ vill’ et paroch’ p’d vel
“ major part eorundem (quorum major pro tempore
“ existen unum esse volumus) unum al’ sive plur al’ de dis-
“ cretion’ et probior’ inhabitan’ vill’ et paroch’ p’d in locum
“ sive loca ipsius assisten’ vel ipfor’ assisten’ sic mori amoveri
“ vel decedere contingen’ vel contingen’ eligere ñoiare et
“ preficere.

“ They likewise produced three papers, proved to be true
“ copies of entries in the books of the corporation by the af-
“ fidavit of John Richards, by the first of which papers here-
“ unto annexed, bearing date the twenty-ninth day of June,
“ one thousand six hundred and ninety-one, it appears that
“ Anthony Salter, Peter Peirce, two capital burgessees, and
“ John Force, were at an assembly of the mayor, capital
“ burgessees, and assistants, upon the said twenty-ninth day of
“ June, one thousand six hundred and ninety-one, removed
“ from their respective offices of capital burgessees and assist-
“ ants, in regard they had for some years before removed
“ themselves and their families out of the town, and inhabited
“ at a distance from the same.

“ By the second paper hereunto annexed, bearing date the
“ seventeenth day of September, one thousand seven hundred,
“ it appears that John Maunder was removed from the of-
“ fice of an assistant of the said corporation, for having with-
“ drawn and absented himself beyond the seas out of the
“ kingdom, for the space of six months and upwards, and
“ neglected

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" neglected his duty, and as they were informed procured
" himself to be made a burgher of Amsterdam.

Note
(E)

" By the third of which papers hereunto likewise annexed,
" bearing date the fifth day of February, one thousand seven
" hundred, it appears that Mr. Edward Bury was removed
" from the office of an assistant of this corporation, for that
" he had for a considerable time then past withdrawn him-
" self and family out of the town and parish, and resided re-
" mote from the same, and had neglected the duty of his
" office.

" To prove that Mr. William Upcot junior, was re-
" moved from Tiverton and settled at Exon, they read the
" affidavit of John Hole hereunto annexed, who swears that
" Mr. William Upcot junior, above five years since re-
" moved with his wife and family out of Tiverton afore-
" said to Topsham (about eighteen miles distant from
" thence) and settled and inhabited in Topsham aforesaid for
" some time, and from thence removed with his wife and
" family to the city of Exon, (about fifteen miles distant
" from Tiverton aforesaid) and the said Mr. Upcot, with
" his wife and family, have ever since been inhabitants in
" Exon, and settled and lived there, and he hath ever
" since used and exercised his trade and business in Exon
" aforesaid; and that the said Mr. Upcot was no way
" settled, or an inhabitant in Tiverton at the time of the
" last election of mayor for Tiverton; and that since the
" said Mr. Upcot's non-inhabiting in Tiverton as afore-
" said, the deponent had, by the order of his father Mr.
" John Upcot, left notice with the said Mr. John Upcot, or
" Mr. Walter Broad in Tiverton, of the summonses of the
" meetings of the corporators and members, intended and
" had in Tiverton, by the mayors and members for the time
" being of the corporation of Tiverton aforesaid, about the
" affairs of the said corporation: but the said Mr. Wil-
" liam Upcot did but seldom attend at such meetings, and
" that

Notes on the Case of Helleston.

Note
(E)

“ that chiefly on elections of mayors and members of
“ parliament, and the said Mr. John Upcot did always tell
“ the deponent that he need not give notice to the said Mr.
“ William Upcot in Exon of such summons as aforefaid,
“ for such meetings aforefaid.

“ They relied upon this as an evidence that Mr. Wil-
“ Upcot junior was incapable of holding the office of an as-
“ sistant any longer ; and that in case the corporation was
“ now subsisting, he ought to be removed : and thereupon
“ they submitted it as a matter proper for consideration,
“ whether, if your Majesty should be graciously pleased to
“ grant a new charter to this borough, as was desired by
“ the second and fourth petitions, this person ought to be
“ restored thereby.

“ The counsel for the petitioners in the first and third
“ petition, argued, that although by the not electing a mayor
“ on the day appointed by the charter, the corporation was
“ reduced to a state of inability to act, yet it was still a cor-
“ poration, and capable of receiving your Majesty’s com-
“ mands by a mandatory writ under the great seal, to pro-
“ ceed to the election of a mayor.

“ That such writs had been granted in cases of the like
“ nature in some corporations, and those corporations do at
“ this day depend upon elections made by virtue of such
“ writs.

“ That it would be of dangerous consequence to hold a
“ corporation dissolved by such an omission, which would
“ put it in the power of a mayor, a single member of the
“ body, to destroy the corporation, either by his neglect, or
“ in order to accomplish some indirect and illegal purposes;
“ by which means the other members of the corporation
“ would be deprived of their freeholds, the estate of the cor-
“ poration would escheat to the heirs of the donors, and the
“ debts owing to and by the corporation would be lost ; for
“ a new charter would not restore the land which, escheated

“ to

Notes on the Case of Helleston.

“ to private persons upon the dissolution of the corporation,
“ nor enable the new corporation to sue for debts due to
“ the old one, or make them liable to debts contracted by
“ them.

Note
(E)

“ That what made it the more necessary in the present
“ case to support the said corporation was, that the right of
“ electing members to serve in parliament for this town
“ was vested by the charter in the mayor, capital burgeses,
“ and assistants.

“ That the best method to prevent the mischiefs apprehended, and put the corporation in the same state it was in before the omission complained of, is by granting a mandatory writ authorizing them to proceed to the election of a mayor.

“ But if a new charter should be thought necessary, they desired it might be humbly submitted to your Majesty's consideration, that it is reasonable and just that the corporation should, as near as possibly it can, be placed upon the same foot it was at the time when a mayor ought to have been elected, which some of the council for the petitioners in the first and third petitions said was all their clients contented for, and that they did not oppose a new charter, provided nothing were done thereby but restoring the old members of the corporation, but if any alteration was to be made they hoped Mr. Burrige, who had been the author of all this confusion, and had occasioned the destruction of the old corporation, if it was destroyed, should not be thought fit to be a member of the new one.

“ As to the point insisted on by the other side, to shew Mr. William Upcot to be disqualified to be an assistant, they denied that if a capital burges or assistant removed out of the town of Tiverton, he was for that reason only removable from his office, unless he also neglected the duty of such office. And they alledged, that though Mr. Upcot had, for the conveniency of carrying on his business,

“ taken

Notes on the Case of Helleston.

Note
(E)

“ taken a house at Exon, and removed his family thither,
“ yet he kept a lodging at Tiverton, where he generally
“ went once a week upon Monday or Tuesday, and returned
“ again to Exon upon Thursday or Friday; but if the affairs
“ of the corporation required his attendance upon other
“ days, he generally attended thereupon in due manner.

“ In support whereof they laid before us the affidavit of
“ Mr. William Upcot junior hereunto annexed, who swears,
“ that about eight or nine years since he purchased a house
“ at Topsham, commodious for carrying on a joint trade in
“ partnership with his father John Upcot, the said town of
“ Topsham being a sea-port town, from whence the woollen
“ manufactory from Tiverton are usually exported, and
“ merchandizes from abroad sent to Tiverton are imported,
“ and soon after the deponent went with part of his family to
“ Topsham for sundry reasons, and among others to receive
“ and forward goods for account of the deponent and his fa-
“ ther in partnership: that for about six or seven years past,
“ the deponent had rented a house in the city of Exon,
“ about three miles nearer Tiverton, where there is a key
“ for shipping off and landing merchandizes, but at the
“ time, and ever since the deponent purchased the said house
“ at Topsham, he continued to keep his house, with part of
“ his family, at Tiverton, until about two years past, when
“ the deponent and his father quitted one branch of their
“ joint trade to Walter Broad and John London (the said
“ Mr. London being a son of the deponent's sister, and Mr.
“ Broad being about to marry the deponent's niece) and
“ thereupon the deponent permitted the said Broad (who had
“ since married the deponent's niece) to live in his house at
“ Tiverton, in regard the deponent's father being a widower,
“ and living in a house adjoining large enough for both his
“ and the deponent's families, and carrying on their said
“ partnership, they agreed to live together, and that there
“ should be an apartment reserved in the house for the de-
“ ponent

“ ponent and his family, which the deponent had since made
“ use of, and that the deponent, to the best of his remem-
“ brance, had been a member of the corporation of Tiverton
“ about ten years; and the mayors of the said town had
“ always sent their summons to the despondent’s habitation
“ there by some of the serjeants at mace (being the officers
“ who carry such summonses) in the same manner as they
“ did at the houses of the other members, as the deponent
“ had been informed. And that since the deponent lived
“ with his father, some of the said serjeants at mace had
“ given notice to the deponent’s father for the deponent’s
“ attendance, as he had likewise been informed. That the
“ deponent never remembered the least complaint made of
“ his non-attendance since he was first chosen a member
“ of the corporation, the trade in partnership between the
“ deponent and his father being very considerable, and well
“ known in Tiverton. And, the deponent’s estate there, for
“ which he had for many years and at that juncture paid more
“ taxes to the King, and rates to the poor within that parish,
“ than at least three of the capital burgesses, and six assistants
“ of the corporation together, (who absented themselves the
“ last day of election for mayor for the then present year)
“ that the deponent pays considerable sums yearly to the city
“ of Exon for duties of goods sent the deponent from
“ abroad, in regard the deponent is not a freeman of that
“ city, which freedom, though it had been offered the
“ deponent, he declined to accept, by reason he would not
“ be obliged to serve in any public offices there, but would
“ be at liberty to do his duty as a member of the corpora-
“ tion of Tiverton, where the deponent generally went
“ Mondays or Tuesdays, and returned Thursday evenings
“ or Friday mornings to Exon, and that the deponent gene-
“ rally attended on other days, when any business of the
“ corporation of Tiverton required his presence.

Note
(E)

“ They insisted also, in case this was an objection against
 “ Mr. William Upcot, it would hold equally against Mr.
 “ Robert Atkins, who being a capital burges, was removed
 “ out of the town, and lived at another place as well as
 “ Mr. Upcot, which was admitted by the council on the
 “ other side.

“ The council for the petitioners in the first and third
 “ petition did likewise lay before us several affidavits to
 “ prove, that Mr. Burrige wilfully absented himself on the
 “ 27th day of August, one thousand seven hundred and
 “ twenty-three, in order to prevent the election of a mayor
 “ for the year ensuing, from an apprehension that a person
 “ would be elected whom he did not approve of, and that
 “ several attempts had been made by Mr. Burrige, or his
 “ agents, to corrupt the members of the corporation by
 “ bribes and other offers, to vote for such person to be
 “ mayor as he should recommend.

“ On the other side several affidavits were laid before us,
 “ to shew that Mr. John Upcot, one of the petitioners in
 “ the first and third petitions, and his agents, had endea-
 “ voured to bribe several of the electors to vote for some
 “ person in his interest, and that what induced Mr. Bur-
 “ ridge to absent himself upon the charter-day was, an infor-
 “ mation he had received, that Mr. Upcot and his party
 “ were determined to carry the election by some violence,
 “ if they could not obtain it otherwise; and that Mr. Bur-
 “ ridge did not then apprehend the corporation would be
 “ destroyed by the not electing a mayor on the charter-day,
 “ but that he had a right to hold over until a new mayor
 “ should be chosen, since the oath taken by the mayor was
 “ to execute the office for a year, and until another mayor
 “ should be lawfully sworn, and there are some instances
 “ where a mayor has held over for a second year. But in
 “ regard your Majesty’s court of King’s Bench has granted
 “ an information against Mr. Burrige for wilfully absent-
 “ ing

“ ing himself with a design to prevent the election of a
“ mayor, and destroy the right and franchises of the cor-
“ poration; and has likewise granted informations against
“ the several persons on each side charged with attempts of
“ bribery and corruption, by which information these facts
“ are put into proper method of trial, and such of the said
“ persons as shall appear to have been guilty of the crimes
“ charged upon them, may receive due punishment by the
“ judgment of the said court thereupon. We thought it
“ unnecessary to trouble your Majesty with repeating the
“ particulars of those affidavits, which, as we humbly ap-
“ prehend, can have no influence upon what we conceive
“ to be the principal question before us, viz. What is the
“ consequence of the corporation's not electing a mayor
“ upon the charter-day, and which is the most proper
“ remedy to supply that omission? Whether a new char-
“ ter, or a mandatory writ.

“ As to the consequence of not electing a mayor upon
“ the day appointed by the charter, we beg leave humbly to
“ certify your Majesty, that your Majesty's court of
“ King's Bench was of such opinion in the case of Mr. Pain-
“ ton, the late recorder of Banbury, as is above-mentioned
“ to be insisted on by the council, who argued for a new
“ charter; with which opinion the parties in that cause
“ acquiesced, and humbly applied to your Majesty for a
“ new charter, which your Majesty was graciously pleased
“ to grant them; which opinion has never been contradicted
“ by any subsequent resolution or opinion of that court,
“ (though often cited there as an authority) nor by any
“ superior court, so far as we have been able to inform our-
“ selves; and we humbly apprehend that judgment in the
“ case of Banbury comes up to the present case, and is a
“ clear authority in law that by reason of this default the
“ corporation of Tiverton is at an end. Neither can we
“ conceive how a corporation can subsist, when it is deprived

Note
(E)

“ of an integral part of the body made necessary by the
“ charter, without any power in themselves of restoring
“ that part, or of doing any one act as a corporation, which
“ was admitted to be the case even by the council for the
“ petitioners in the first and third petitions.

“ And we being commanded by the order made by their
“ excellencies the late Lord Justices upon the first petition
“ to report what we conceive proper to be done in the
“ premises, do further certify your Majesty, that since no
“ judgment of any of your Majesty’s courts of law has
“ hitherto passed in the present case of Tiverton, we should
“ have humbly been of opinion, that it was not a case pro-
“ per for your Majesty’s royal interposition, before some
“ legal determination had been made therein; unless both
“ the contending parties of the corporation had applied to
“ your Majesty for relief. But as all the members of the
“ body are now before your Majesty, by the several peti-
“ tions, some desiring a mandatory writ, and others a new
“ charter, and all of them admitting that they are incapable
“ of electing a new mayor without your Majesty’s gracious
“ aid; we apprehend the matter is reduced to this single
“ question, which of the two methods proposed is most
“ adviseable.

“ As to a mandatory writ, we cannot but think that
“ method would be most desirable in the present case, as
“ tending most to the preservation of the ancient franchise;
“ provided it could be effectual in point of law for the pur-
“ pose intended. But that we conceive it cannot be, be-
“ cause if there is no corporation in being, there is no body
“ to whom the writ can legally be directed, or that can
“ legally execute it (1); unless it is considered as to creating
“ a corporation for that purpose; in which view it will be
“ liable

(1) The warrant sometimes directed by the king to the magistrates of the former year, for a borough of Scotland, when the legal day of election has been slipped, is in the nature of the mandatory

“ liable to the same objections that are made against a new
“ Charter ; for such corporation, so created, must be a new
“ Corporation. For which reasons, and considering the great
“ doubts that have been always made concerning this pro-
“ ceeding, there is just reason to fear that if your Majesty
“ should order a mandatory writ to issue in this case, it
“ might only tend to lay a further foundation of uncertainty
“ and confusion in this borough.

“ Upon the whole matter we are humbly of opinion, that
“ the safest and most adviseable method of restoring to the
“ inhabitants of this town the capacity of acting as a cor-
“ poration, and the franchises and privileges which they for-
“ merly enjoyed, is by a new charter of incorporation and
“ confirmation ; for if the corporation is dissolved, we con-
“ ceive nothing but a new charter can restore it ; and if it
“ is not dissolved, such new charter will not deprive any
“ person of the rights which he claims under the old incor-
“ poration, or prevent any legal enquiry whether the old
“ corporation be dissolved or not.

“ As to the terms upon which a new charter should be
“ granted, in case your Majesty shall be pleased to grant one,
“ (which both sides have made a part of their arguments
“ in this case) we conceive this is a matter more proper
“ for a subsequent consideration. But we beg your Ma-
“ jesty’s permission to observe in general, that as the mis-
“ fortune brought upon the inhabitants of the town, was not
“ occasioned by the default of the whole body or the major
“ part of the members, but by the default of the mayor only,
“ whether designedly or not, is not yet determined ; there-
“ fore it seems just, that if a new charter shall be granted,
“ the corporation and the late members of it, should be
“ restored as near, as reasonably may be, to the same state
“ they were in before this misfortune happened.

mandatory writ, which it would seem and Solicitor General thought could
had been proposed in the case of not be executed. *Vide infra*, Case
Tiverton, but which the Attorney of Wigtown, &c. note (I).

Note
(E)

“ As to the objection made by the petitioners in the
“ cond and fourth petitions, against Mr. William Upc
“ that he was become incapable of being an assistant
“ reason of his residing at another place in the man
“ above-mentioned; we conceive that objection to
“ founded on a wrong construction of the charter, in whi
“ the word *decedere* is not, as we apprehended, used to sign
“ leaving the town, but a desertion of the office; and in t
“ of the instances of amotions produced, the cause of amoti
“ expressed was not only removing out of town, but a
“ neglecting the duty of the office; which is not shewn
“ be the case Mr. Upcot: and therefore, notwithstanding
“ any thing laid before us, he was a good assistant on t
“ last charter day for election of a mayor.

“ All which is most humbly submitted to your Majesty
“ royal wisdom.

(Signed)

“ P. YORKE,

“ C. WEARG.*

“ 6th July 1724.”

The cases of Banbury and Tiverton gave rise to a
statute of the 11th of George the First, cap. 4.

Note
(F)

P. 43, 51. (F). It appears from the account of the
case in the Journals, that evidence was produced to show
That, *several* of the men claiming to be burgesses had signed
petitions for the new charter, which recited, that the
corporation was dissolved: That none of them had, till the
election, ever claimed to act as burgesses after judgment
ouster had been obtained against one Roger Philips,
1758; that they had notice thereof, and acquiesced in
By that judgment his election, which had been made upon
a bye-law, transferring the right of election from the may
burgesses, and commonalty, to the mayor and common
council, was declared illegal. Journ. vol. xxxii. p. 763. col.

*[I have thought it right, in the present edition, to insert the whole of this learned and valuable Report, *verbatim*. It has been taken from the original, preserved in the Council office.]

XV.

THE
C A S E

Of the BOROUGH of

B E D F O R D,

In the County of BEDFORD.

The COMMITTEE was chosen on Tuesday, the 14th of March, and consisted of the following Gentlemen.

John Elwes, Esq. Chairman.	- - -	} Members for	Berkshire
Thomas Dundas, Esq.	- - -		Orkney & Zet.
George Grenville, Esq.	- - -		Bucks
Richard Aldworth Neville, Esq.	-		Grampound
Ambrose Goddard, Esq.	- - -		Wiltshire
Jervoise Clarke, Esq.	- - -		Yarmouth Hts
William Ewer, Esq.	- - -		Dorchester
Filmer Honywood, Esq.	- - -		Steyning
Sir Brownlow Cust, Bart.	- - -		Grantham
James Sutton, Esq.	- - -		Devizes
John Cooper, Esq.	- - -		Downton
Daniel Lafcelles, Esq.	- - -		Northallerton
Andrew Foley, Esq.	- - -		Droitwich
N O M I N E E S.			
Of the Petitioners,			
Lord George Germaine	- - -		East Grinft.
Of the Sitting Member,			
Richard Jackson, Esq.	- - -		New Romney

P E T I T I O N E R S

Samuel Whitbread, Esq. and John Howard, Esq.
 Certain Burgesses, Freemen, and Inhabitants, being free-
 holders of Bedford, and electors for that borough.

Sitting Members.

Sir William Wake, Bart. Robert Sparrow, Esq.

C O U N S E L

For the Petitioners.

Mr. Lucas, Mr. Lee,

For the Burgesses, &c. Petitioners.

Mr. Macdonald.

For the Sitting Members.

Mr. Bearcroft, Mr. Hardinge, and (in Mr. Bearcroft's
 absence) Mr. Arden.

THE
C A S E

Of the BOROUGH of

B E D F O R D.

WHEN the Committee met on Wednesday, the 15th of March, the two petitions were read.

That of Mr. Whitbread and Mr. Howard, (besides the usual allegations, of the partiality of the returning officers in admitting and rejecting votes, and that the petitioners had a great majority of legal votes, and were duly elected,) contained a charge of bribery against the sitting members, by themselves or agents (1).

The other alledged; That the mayor, aldermen, and other officers of the borough had, previous to the election, got a majority of *pretended* electors under their own influence, with a design to render the election of the members for the borough subservient to the will of the corporation; that they had corruptly made offers to one or more persons to procure them to be elected, in considera-

[70]

(1) Votes, 6 Dec. 1774. p. 29, 30.

tion

tion of a large sum of money to be paid to them, and that John Cawne, John Rose, and Thomas Howard, the returning officers, had been guilty of corrupt, partial, and illegal practices, previous to, and during the course of, the election (1).

The last determination in the House of the right of election in Bedford, was then read, and is as follows :

12 April, 1690, Resolved, "That the right of
" election of burgeses to serve in Parliament for
" the borough of Bedford is in the burgeses, free-
" men, and inhabitants, being householders of
" Bedford, not receiving alms (2)."

[71] (3) The difference between a burges and a free-
man in Bedford is, that all the sons of a burges are
entitled to be burgeses, and only the eldest son of
a freeman is entitled to be a freeman. The magi-
strates are all chosen out of the burgeses.)

Then the standing order of 173 $\frac{5}{8}$ was read (3.)

The numbers on the poll, as declared by the re-
turning officers, were,

For Sir William Wake	- - -	527
For Mr. Sparrow	- - -	517
For Mr. Whitbread	- - -	429
For Mr. Howard	- - -	402

There were several questions in this case upon
the construction of the last determination, and it
being admitted that, if certain restrictions severally
contended for by the different parties should be

(1) Votes, *loc. cit.* p. 30, 31. (3) *Supra*, vol. i. p. 99.

(2) Journ. vol. x. p. 376. col. 2.

helden by the Committee to be agreeable to the meaning of the determination, they must succeed; it was agreed by the counsel on both sides, and by the Committee, that those questions should be argued and decided separately.

1st Point.] The counsel for the petitioners contended; That the expression, "*being householders of Bedford*," was to be applied as well to the *burgesses and freemen* as to the *inhabitants*; or, in other words, that *non-resident* burgesses and freemen have no right to vote,

[72]

Their arguments were as follows:

It is at once most consistent with logic, and with grammar, to extend the restriction at the end of the period to all the three classes of persons mentioned in the antecedent part. Accordingly, the restraining words are very properly in the printed Journals separated by a comma from the class last mentioned, (*viz.* "*inhabitants*,") to shew, that their effect is not particularly confined to the last member of the sentence.

The restriction is *reasonable* as extended to burgesses and freemen in this borough. If it is just, that the representatives of Bedford should be chosen by those who have a natural relation to the place, it is reasonable that it should not be in the power of the majority of the corporation, (by which name is understood about thirty persons, the mayor, recorder, two bailiffs, thirteen common council, and from ten to fifteen aldermen), who have, or claim the right of admitting any number
they

[73]

they please of burgesſes and freemen, to overwhelm and annihilate the voices of the inhabitants, by chooſing, when they think proper, an indefinite number of new burgesſes and freemen, perfect ſtrangers to the borough, for no other purpoſe but to carry an election.

It is a *legal* reſtriction, for ſuch a reſtriction has, in many other boroughs, been recognized by expreſs reſolutions of the Houſe.

Any *uſage*, ſince the determination in 1690, cannot affect the ſenſe of that determination, which muſt have been founded on evidence of the uſage prior to that time; and it can be ſhown, not only that no evidence can be produced of *non-refidents* having ever voted *before* 1690, but that, till then, the number of non-refident burgesſes and freemen had always been ſo ſmall, (only now and then a country gentleman of diſtinction, and chiefly the members for the borough, who were made free by way of compliment (1), that their votes could never have been of any conſequence at an election; and therefore that the Houſe, in making the determination, could have no view to them.

[74]

If the Houſe had meant to confine the reſtraint of being houſeholders merely to thoſe who vote as inhabitants, they would have expreſſed themſelves in unequivocal terms, ſuch as they have uſed in other caſes where they had that intention. They would have ſaid, that the right of election was in

(1) This was proved by the corporation books.

the burgesses, freemen, *and also in the inhabitants being freeholders*, or in the burgesses, freemen, *and such of the inhabitants as are householders*; or, to confine the restrictive clause to the last member of the sentence, they would have used terms like those employed in the last determination of the right of election in Wallingford.

15 Dec. 17c9. Resolved, "That the right of electing burgesses, to serve in Parliament for the borough of Wallingford, in the county of Berks, [75] is in the mayor, aldermen, bailiffs, and eighteen assistants, *together with the inhabitants of the said borough, paying scot and lot*, and not receiving alms, or charity (1)."

If the expression "*being householders*" is not to be carried back to all the members of the sentence, neither can the subsequent words "*not receiving alms*;" and then we must suppose that the House meant to declare that burgesses and freemen, even if they had received alms, had a right to vote; which would be to suppose that they thought the receipt of alms (or parish relief) no disqualification to the burgesses and freemen of Bedford. But the Committee will not adopt such a construction, when they consider that this is a general disqualification by the law of Parliament.

COUNSEL for the sitting Members.

Where the sense of a last determination is doubtful, evidence of usage may be produced to

(1) Journ. vol. xvi. p. 243. col. 1. 244. col. 1.

[76]

shew the true intention and meaning of the ambiguous words. This was done in two very recent instances, those of Radnor and Dorchester.

Although it is true, that direct evidence cannot be given to prove that *non-residents* have voted in this borough before 1690, it can be shewn that they constantly have at all contested elections for above forty years backwards; and evidence of usage for such a considerable number of years, without proof of a different usage at any previous time, would, in law, be a sufficient presumption to establish an immemorial custom.

It has been admitted, by the counsel for the petitioners, that they cannot bring any direct evidence to shew that non-residents never voted before the determination in 1690; and mere arguments by *implication and inference* against the usage, at a *previous* period, cannot destroy the force of *direct* evidence of usage, though *posterior* to the time to which that implication applies. Direct evidence, therefore, of the usage for non-residents to vote *since* the determination, uncontradicted by direct evidence of an antecedent contrary usage, is to be considered as establishing such usage *previous* to the determination.

[77]

Arguments, from convenience or policy, may be very proper, addressed to the legislature, to persuade them to repeal a law (A), but they cannot weigh with a court of justice in a case where the subsisting law, whether politic and convenient, or otherwise, is fixed and ascertained by words, whose sense,
if

if they are of themselves doubtful, is clearly interpreted by usage. Yet, even on this ground of convenience and policy, the counsel for the petitioners argue against a maxim generally admitted to be founded in the principles of the constitution: namely, That the right of election ought to be extended as much as possible.

The receipt of alms is probably a disqualification by the common law of Parliament, but the words "*not receiving alms*" may, consistent with grammatical construction, be carried back through the whole sentence (1) without the words, "*being householders*"; or if it should be thought that they cannot still, in order to entitle the petitioners to any benefit from the argument drawn from thence, we must suppose; 1. That this disqualification by alms is uncontrovertible, as applied to burgesses and freemen. 2. That the house of commons thought so in 1690, 3. That the house at that time meant to *declare* the law on this subject, not only with regard to inhabitants, but also with regard to *burgesses* and *freemen*.

[78]

Now the general principle, that alms disqualify voters of all descriptions, has not been *proved*, and will probably be disputed in a subsequent part of this case. If it were *admitted*, it does not follow that the house of commons thought so in 1690, and that they might not think, and intend to declare, that, by the *lex loci* in Bedford, only *inhabi-*

(1) *Vide* the resolution of the Committee, *infra*.

[79] *tants*, who were householders, and *had not received alms*, could vote, but that all *burgesses and freemen* could, even *if they had received alms*. And, if it were also admitted, that we must presume the house to have known the general principle on this subject, it will still remain to be proved, that it was impossible for them to intend to *declare* the general law by *express words*, with regard to those who were entitled to vote as *inhabitants*, and to leave the law to operate, without any express declaration, with respect to the other two classes of *burgesses* and *freemen*.

The words "*being householders*," cannot be carried back to the two first classes of voters, without rendering the mention of those two classes superfluous and nugatory : for to say, "That the right of election is in *the burgesses and freemen, being householders, and in the inhabitants, being householders of Bedford*," expresses no more than would be done by saying simply, "The right of election is in *the inhabitants, being householders of Bedford*."

Arguments from punctuation do not deserve any regard. To prevent any arguments of that sort, points are never used in law records : if they were to be considered as of any weight, it would be in the power of every clerk, copyist, or printer, to alter the meaning of a law.

After they had spoke in effect as has been just stated, the counsel were directed to withdraw, and, on being called in again, the chairman informed them,

" That

"That the committee were of opinion, that they
 " might proceed to call *evidence*, to shew whether
 " burgeses and freemen have a right to vote,
 " though not householders of Bedford, under the
 " resolution of the house of commons of 12 April,
 " 1690." *

An explanation of this resolution of the committee being desired by the counsel, the chairman said, "It was meant that they should bring evidence of the usage subsequent to the last determination."

On this, a number of witnesses, inhabitants and members of the corporation of Bedford, were called, who proved, from their own knowledge, that *non-resident* burgeses and freemen had voted at different contested elections, ever since the year 1730. They swore likewise to constant uncontroverted reputation.

The counsel for the sitting members were proceeding to bring more evidence to the same purpose, but they were informed by the chairman,

"That the committee were satisfied of the usage since 1730."

No evidence was given on the part of the petitioners to shew, that, at any previous period, the

[81]

* ["*Nuper obiit in A. B. and* " not have relation but to the
 " *C. in the isle of P.* The te- " last vill. But Brooke says
 " nant said, that no such vill " *Quod Mirum* ! Br. Brief, pl.
 " as A. and B. in the isle, & " 157, cites 7 H. 6. 8.]
 " *non allocatur*, for isle shall

usage was that non-resident burgesſes and freemen were not admitted to vote.

Before the committee came to any reſolution on this queſtion of *non-refidency*, the counſel for the petitioners entered upon other two grounds of objection, which affected all the votes liable to the former.

The firſt was, That they were *honorary* burgesſes and freemen.

The ſecond, That they were *occasional*.

[Ild. Point.] On the firſt of thoſe two heads they contended, That the corporation of Bedford could not admit burgesſes or freemen, unleſs perſons who had either an antecedent inchoate right by birth or ſervitude, or who had acquired ſuch a right by redemption; that is, by paying a real ſubſtantial conſideration in money for their freedom. That *honorary* burgesſes and freemen, therefore, were in fact neither burgesſes nor freemen, and could have no right to vote.

To prove this poſition they produced the following evidence:

- [82] 1. Two bye-laws; one of 1562, and another of 1612. The firſt of thoſe applied rather to the point of non-refidency. The ſecond ordains, " That there ſhall be no *foreigner* admitted to be " a freeman, unleſs under ſpecial circumſtances " (there mentioned;) and that if ſuch foreigner be " allowed, he ſhall pay five pounds for his freedom " unto the chamberlains for the time being, to " the

" the use of the mayor, bailiffs, burgesſes, and
" commonalty."

2. Entries of a variety of admissions on the payment of fines of different amount, from forty shillings to fifteen and twenty pounds, over and above the admission fees. In many of those instances, a condition is annexed to the order for admission, that if the party do not find sureties for the payment of his fine, or actually pay it within a limited time, the admission shall be void.

3. Certain entries of the admissions of persons in the time of the Republic, and subsequent entries, after the Restoration, declaring those admissions to be illegal.

12. Aug. 1656. Major-General Boteler, Cockayne, Carter, Whitbread, and Wagstaffe, were admitted *gratis* to their freedom. [83]

15 Oct. 1660. The jury find with regard to those persons, "*Quia contra jura, consuetudines, & privilegia ejusdem villæ introducti fuere, per vim fraudem & surreptitæ, eos fore nullos de gilda, sed extraneos & forinsecos.*"

From comparing these two entries, they argued, that the circumstance of not paying any fine was what was against the *laws, customs, and privileges* of Bedford in the admissions in 1656.

It appeared that, in 1769, when above 500 of the freemen objected to as *non-resident*, and now as *honorary*, were made, they only paid one guinea including admission fees; and it was proved that, at that very time, the corporation had obliged

several tradesmen, inhabitants of the town, to pay five guineas for their freedom.

[84] The counsel for the sitting members produced, on the other hand, a great many entries in the corporation books, beginning in 1654, of orders for the admission of persons who had no previous title, "without the payment of any fine or *prestation* to the chamber, or even of the usual fees;" and many others, when the fines were of various, and very small amount, down to fourteen shillings.

(The instance in 1654, was the admission of Sir Bulstrode Whitelock.)

They then argued as follows:

If it was thought that the persons admitted in 1769 were not *legal* freemen, why were they not proceeded against at law, by informations in the nature of *Quo warranto*? From that time till now their right to their freedom has not been impeached; and, although this Committee is competent to the decision of any preliminary question which may lead to the ultimate determination of the merits of the election, yet they will not enter into an enquiry about corporate rights, when the parties have had full time to try them in the court particularly appropriated to such questions, and have not done it. In the case of Shrewsbury, the [85] Committee would not go into such an enquiry. There, indeed, there had been two verdicts at law on the question (1). But, where there has been

(1) *Vide supra*, vol. i. Case of Shrewsbury.

time

time to try the matter at law, it is fair to conclude, that the party who has not taken advantage of the opportunity, had good reason to think that the attempt would have been fruitless. One method of setting aside all the freemen made in 1769 at one stroke was tried, for an information was moved for, and obtained, against Heaven, the mayor of that year. If he had not been a legal mayor, all their admissions would have been illegal. But, after long consultations of some of the ablest counsel in Westminster-hall, it was thought adviseable to drop the prosecution.

It is not contended that the election of *honorary* freemen is contrary to any *general principle of law*. Indeed in many boroughs, as Gloucester, Cambridge, &c. the right of making such freemen has been recognized by the House, and they vote at all elections; but the counsel for the petitioners insist that, by the *particular law* of Bedford, persons who have not inchoate titles cannot be admitted to the freedom of the place, unless on the payment of a sort of a *customary* fine. Now, one of the first requisites of a custom is *certainty*, and here they themselves have shewn that the fine paid has been *different* in almost every different instance.

[86]

If the bye-laws, on which they rely, should be thought to apply to this question, yet being merely regulations made by the corporation to controul their own discretion, it was in the power of the corporation to repeal them; and this they have virtually done by acting afterwards without any

regard to them, as has been proved by the numerous instances of their exercising the right of making honorary freemen, or freemen *by favour*, for above a century, down to the present time.

[87] It cannot be seriously thought that, in the entry of 1660, with regard to the rescinding the admissions of Boteler and the others, the words "*contra jura, consuetudines, & privilegia*" mean, that they were admitted contrary to a specific custom of paying a fine. If that had been meant, the custom would have been specially stated, and not in general expressions, which are evidently mere words of course. It is pretty clear, when we consider who those persons were, and compare the situation of things at the different æras of 1654 and 1660, that they were turned out, because their party was no longer uppermost, and that the "*vis*," "*fraus*," and "*surreptitie*," only mean to convey a declaration that the corporation had admitted them through influence and compulsion.

III^d Point.] The counsel for the petitioners next contended, That the votes of those who had been objected to as *non-resident* and as *honorary* burgesses or freemen, were also void as being *occasional*.

(~~1~~ They had all been made above a year before the election, so that none of them were affected by the Durham act.)

They said,

[88] (1) Occasionality is fatal to all votes, by the

(1) *Vide supra*, Cases of of Helleston, vol. ii.
Downton, Bristol, vol. i. and

common

common law of Parliament. Before the statute of the 3d of George the Third, cap. 15, there was no limitation in point of time, with regard to occasional freemen, but if a man acquired his freedom merely for the purpose of voting at an election, although more than a year before that election, his vote, on that occasion, was fraudulent and void. Now when a statute is made declaratory of the common law, and only superadds new penalties to the infringement of that law, within a certain time, or under special circumstances, such statute is only cumulative, and does not take away the common law, or alter it, farther than by enforcing it for the limited time or under the particular circumstances when the statutory penalties are made to attach. Therefore, though the statute of George the Third enacts, that a freeman, who has not been admitted twelve kalendar months before the election, shall not presume to vote, under a certain penalty, unless he have an antecedent title by birth, marriage, or servitude, and that if he presume so to do his vote shall be void, the common law disqualification still remains as to occasional freemen of longer standing than a year. The difference is this: within the year, the statute *presumes* the occasionality, and makes it unnecessary to prove it, whereas, beyond the year, it lies upon the person who makes the objection of occasionality to prove it, according to the general maxim, that fraud is not to be presumed.

[89]

The counsel for the sitting members admitted,

that the persons whose votes were objected to, had been made free of the town of Bedford for the purpose of voting at the election for that place. But they contended,

[90]

That to constitute a disqualification by occasionality, the freemen must have been admitted to serve the purpose of some particular candidate, or candidates, which was the case at Durham on the occasion which gave rise to the act of the 3d of the present King; that there was no such purpose in view when those freemen were made, (most of them in 1769) the present sitting members not having been then thought of by any body for candidates; and, besides, they did not assent to the position of the counsel for the petitioners, but on the contrary were clear that, though at common law there was no limited time to which the occasionality of freemen was restrained, yet, by the statute, the legislature had drawn the line beyond which, since the time when that statute passed, this objection cannot be made,

In reply, the counsel for the petitioners, besides enforcing their former arguments, observed,

That the meaning of occasionality cannot be confined to the intention of serving particular candidates, for that the freemen who are made at any time less than twelve months before the election, are, by the statute, denominated occasional; and, yet, in many instances, it is not known who the candidates will be till very near the time of the election,

election, especially in the case of a vacancy occasioned by any unforeseen event.

The counsel being directed to withdraw, the Committee deliberated for a considerable time, and when they were again called in, the Chairman said he was directed to inform them, [91]

"That the Committee were of opinion, that the words, "*being householders of Bedford*," contained in the resolution of the House of Commons of 12 April, 1690, do not refer to the "*burgesses and freemen*, but to the *inhabitants* only."

The Chairman likewise said, (though not in the formal words of a resolution,)

"That the Committee were clear in their opinion, that the objection of occasionality did not lie against freemen made above a year before the election."

They delivered no opinion concerning the right of the corporation to make *honorary* burgesses and freemen; but, as that objection, if the Committee had thought it valid, would have annulled the votes of all those who were objected to as *occasional* and as *non-resident*; and as their votes were, after this preliminary decision, considered by the counsel on both sides, in their subsequent arguments, as established, and were admitted to be necessary in order to give Sir William Wake a majority (1) on the poll, it follows necessarily, that the Committee [92]

(1) See the Determination in his favour, *infra*.

were of opinion, that such honorary burgesſes and freemen are legal members of this borough.

(☞ The ſeeming want of preciſion in the determination of the Committee on thoſe three diſtinct heads, muſt have ariſen in ſome meaſure from the counſel for the petitioners having gone from the queſtion of non-refidency upon the other two, before the Committee had decided the firſt.)

The counſel for the petitioners having failed in the firſt part of their caſe, proceeded to another queſtion, which was,

[IVth Point.] Whether perſons having received of a charity called Harpur's charity, within a year (B) before the election, were entitled to vote, or whether ſuch perſons are diſqualified under the words, "*receiving alms*," in the laſt determination.

[93] A great number of perſons in that predicament had tendered their votes for Mr. Whitbread and Mr. Howard, and were rejected by the returning officers.

The evidence produced on this ſubject was as follows :

By letters patent, bearing date the 15th of Auguſt, 1552, King Edward the Sixth gave licence to the mayor, bailiffs, burgeſſes, and commonalty of the town of Bedford, to erect a free-ſchool, having a maſter and an uſher, to be nominated by the maſters and wardens of New College, Oxford, and gave them liberty to acquire lands, &c. to the clear

clear yearly value of *forty pounds*; to hold to them, the mayor, bailiffs, &c. for the sustentation of the said master and usher, for the marriage of poor maids of the said town, for poor children there to be nourished and informed, and also, "*The Surplusage coming or remaining of the premises to distribute in alms to the poor of the said town for the time being.*"

Sir William Harpur, in consequence of those [94] letters patent, did, in 1566, grant certain lands and houses in Bedford, and also thirteen acres and one rood of meadow, in the parish of Saint Andrew, Holborn, in the county of Middlesex, to the said mayor, &c. for the sustentation of the said master and usher, for the marriage of poor maids of the said town, and for poor children there to be nourished and informed, "*according to the form of the said letters patent.*"

These thirteen acres and a rood, were, soon after, reduced by encroachments to twelve acres, one rood, and thirteen poles.

About the year 1668, the corporation let them for a term of forty-one years, at the annual rent of ninety-nine pounds. The expiration of that lease would have fallen of course in the year 1709.

In 1684, a reversionary lease was granted for the further term of fifty-one years, to commence at the expiration of the former, and at the yearly rent of one hundred and fifty pounds.

Under those and other derivative leases, the following streets, &c. Bedford-street, Bedford-Row, [95]
Bedford-

Bedford-Court, Prince's-Street, Theobald's-Row, North-Street, East-Street, Lamb's-conduit-Street, Queen-Street, Eagle-Street, and other streets and courts, in the parishes of St. Andrew, Holborn, and of St. George, Queen Square, were erected.

By this means, the estate was, at the expiration of the term of fifty-one years, which happened in 1761, encreased to a great value; and it became expedient to have an act of Parliament passed, to regulate the management, and appropriation of the revenues.

Accordingly, in the year 176-, an act passed for that purpose, which, (after regulating the amount of the salaries of the master and usher, the sums to be given for portioning poor maids, and a sum to be applied yearly for apprenticing poor children, besides other necessary expences); enacts, " That the *surplusage* of the rents and profits shall
 [96] " be distributed in *alms* to the poor of the said
 " town, for the relief and support of poor decayed
 " housekeepers, and other proper objects."

In the original bill, there was the following proviso: " That no freemen or inhabitants of the said
 " town of Bedford, receiving benefit from the said
 " charity estate, in any manner whatever, shall
 " thereby be disqualified from voting for members
 " of Parliament for the said town of Bedford."

This clause was at the third reading, (on an amendment for that purpose being moved) left out of the act.

By the act, a certain number of trustees are
 added

added to those who were so by the original foundation, as members of the corporation.

Such being the nature of this charity, it was proved, by a great number of witnesses (several of whom had been trustees of the charity, and overseers of the poor, and some, agents at elections); That this charity has been distributed to many persons who paid to church and poor; That about three-fourths of those who had received it at the last distribution, paid the parish taxes, some of them to the amount of nine shillings; That it has always been given to middling sort of people, without solicitation on their part; That it has always been considered, in Bedford, as a sort of *donation*, and distinguished from parish pay, the charity being called *Hall-money*, (because it is distributed at the common-hall) and the parish pay *collection*. One Negus, (a person of fifty years of age) swore particularly to a man who rents eighteen pounds a year, and yet received the charity; and to another who received it, although he paid nine shillings a year to the parish of which he (Negus) is overseer. The same witness swore, that his own father died nineteen years ago, aged seventy, and that he had heard him say, that he had received the charity constantly from the first year of his marriage, and that he had voted at Sambroke's election, in 1730, and at other elections, and that no objection was ever made to his vote.

[97]

All the witnesses said, That, till the last election, they had never heard the right of Harpur's charity men

[98]

men to vote called in question; That it was always understood they had a right; That many, to their knowledge, had voted at every contested election which they recollected. (The names of several were specified.) That the votes of persons receiving parish pay had always been rejected, and that, to know whether any person had received it, recourse was always had to the parish books; but that, when this objection of Harpur's charity was started at the last election, it astonished every body.

The counsel for the sitting members said, they could not call any witnesses to contradict or disprove those facts.

COUNSEL for the Petitioners.

It is clear, from the nature of the charity, and from the words of the resolution, as interpreted by the usage which has been proved, and not contradicted, that the charity in question does not disqualify.

[99] That charities of this sort do not necessarily disqualify, by the common law of parliament, is proved by the case of Coventry.

24th February, 170 $\frac{1}{2}$, It was resolved, " That
" the freemen of Coventry receiving alms, or charity,
" have no right to vote in the election of citizens,
" to serve in Parliament for the city of Coventry. (1)."

(1) Journ. vol. xiii. p. 763. col. 1.

Yet,

Yet, though the very word "*charity*" is used in that disqualifying resolution, the house afterwards determined, on the 1st and 3d of March, 170⁵, "That Sir Thomas White's gift (1), and Thomas Wheatley's gift (2), do not disqualify-" Both which charities are exactly analogous to that now under the consideration of the Committee.

In general, where, by the usage of the place, persons receiving relief from the revenues of particular charities are disqualified, the house, in determining the right of election in that place, has inserted the word "*charity*" in the disqualifying part of the resolution. The case of Taunton is particularly strong to shew that the word "*alms*" alone does not, in the language of Parliament, comprehend particular charities (3). [100]

There are, to be sure, cases to be found in the Journals, where it has been determined that charities founded by private persons disqualify, although the word "*alms*" only has been used in the resolution declaring the right of election; but there are none, where it has been so holden, when the usage had been (as in the present case) proved to be in favour of the votes of men receiving such charities.

That, in the present case, in the determination of 1690, the house, by the word "*alms*," meant

(1) Journ. vol. xvi. p. 129. col. 1.

col. 2.

(3) *Supra*, vol. ii.

(2) Journ. same vol. p. 135.

only parish relief, will appear from an attentive examination of the evidence on which the determination was formed. The evidence then produced was, a declaration of the common-council, bearing
 [101] date the 19th of December, 1687, "That every
 "inhabitant, not taking *collection*, nor being so-
 "journer, hath a vote (1)."—Now "*collection*" has
 been proved to be the term by which parish pay
 is specially distinguished to this day in Bedford (2).
 It is a term familiar to the legislature in that sense,
 as appears by a great variety of statutes, 27 Hen.
 VIII. cap. 23. 1 Edw. VI. cap. 3. 5 and 6 Edw.
 VI. cap. 2. 5 Eliz. cap. 3. 17 Geo. II. cap. 3. § 1.
 Indeed, one of the first statutory modes of relieving
 the poor, before the act of the 43d of Elizabeth,
 was literally by *collection* made on Sundays in the
 parish church (3).

The reasons why many think that *alms* or *parish
 collection* disqualify by the common law, and that
 the resolutions of the house where they are men-
 tioned, are only declaratory of that law, do not ap-
 ply to the *charity* in question. Those reasons are,
 [102] that men who are obliged to trust to the parish for
 their sustenance, would not be able to contribute
 to the wages of their members, and that such in-
 digent persons can have no independent will of
 their own, and cannot give a free suffrage. The
 major part of those who received Harpur's charity,

(1) Journ. vol. xvi. p. 376
 col. 1.

(3) 27 Hen. VIII. cap. 25.
 1 Edw. VI. cap. 3.

(2) *Supra*, p. 97.

have been proved to be in circumstances sufficiently easy to contribute to the maintenance of others, and to pay both to church and poor (1).

COUNSEL for the Sitting Members.

"*Alms*" is certainly a generic word, comprehending every species of pecuniary relief bestowed on the poor for their sustenance, and when "*charity*" is used to signify such relief, the two words are convertible and synonymous. This appears by the very etymology of "*alms*," which is taken from the French word "*aumônes*," anciently written "*almofnes*," and that from the Greek word "Ελεημοσύνη," which is thus defined by the grammarians, "*Omne beneficium quo calamitosos prosequimur*." The word "*alms*" is used to express the part of Harpur's charity which was to be distributed to the poor, both in the letters patent of Edward the Sixth, and in the act of Parliament of the present King; and by several orders of the trustees for the distribution of the money since the statute, they themselves call it "*alms*." One of those orders of 31st Dec. 1770, is, "That 200l. the surplus of the Bedford charity, be distributed in *alms* to the poor." (1) This was read from the books of the charity.)

[103]

If "*collection*" is the expression, which, by the custom of Bedford, is peculiarly appropriated to *parish relief* in that place, the house in 1690, if they

(1) *Supra*, p. 96, 97.

had meant that no other sort of charity disqualified there, would have made use of that word. We may therefore infer that, by choosing to employ another word, they meant a different, and more general, disqualification.

[104] In the case of many boroughs, where the house had declared the right of election to be in persons not receiving *alms*, they have, on subsequent occasions, decided that the receipt of *charities*, like that now under consideration, are within the disqualification.

28 January, 169⁵/₈, Resolved, "That the right of
" election of burgessees, to serve in parliament for
" the borough of Aylisbury, in the county of
" Bucks, is in all the householders of the said
" borough, not receiving *alms* (1)."

7 February, 169⁵/₇, Resolved, "That all persons
" receiving *alms* within the borough of Aylesbury,
" pursuant to the will of Mr. Bedford; or any
" other persons receiving any *other charity*, annual-
" ly distributed within the same town; are, in-re-
" spect thereof, disabled to vote in the election of
" burgessees to serve in parliament for the said
" borough (2)."

[105] Mr. Bedford's charity in Aylesbury, is exactly similar to Sir William Harpur's (C). It is observable, that, in this last resolution, the house use

(1) Journ. vol. xi. p. 419.
vol. 2.

(2) Journ. vol. xii. p. 490.
col. 2.

"*alms*" and "*charity*" as words importing exactly the same thing.

2 December, 1708, Resolved, " That the right
" of electing burgesſes, to ſerve in Parliament for
" the borough of Reading, in the county of Berks,
" is in the freemen, and inhabitants ; ſuch freemen
" not receiving *alms*, and ſuch inhabitants paying
" ſcot and lot (1)."

4 December, 1708, " A motion being made, and
" the queſtion being put, that ſuch perſons, as
" have, *within two years* laſt, received *Kendrick's*
" *charity*, or any other *annual charity*, diſtributed in
" the borough of Reading, have a right to vote in
" elections of burgesſes, to ſerve in parliament for the
" ſaid borough :—It paſſed in the *negative* (2)."

By the ſtatute for regulating elections in the
city of London, perſons having received *alms* with-
in two years, are diſabled from voting ; and thoſe
who are acquainted with the practice in the city,
know that thoſe words of the ſtatute have been
conſtantly underſtood, and conſtrued, to extend to
all charities. [106]

If the Houſe has, on ſome occaſions, drawn a line
between *alms* and *charities*, by making a diſtinction
where there is no difference, this is to be aſcribed to
motives which are too well known to have often
influenced the former judicature in deciding the
rights of election. But thoſe caſes, (although the

(1) Journ. vol. xvi. p. 26. (2) Same vol. p. 27. col. 1.
col. 2.

decisions of them may be conclusive in the particular places with regard to which they were made, in consequence of the statute of George the Second (1,) are not certainly of a fort to direct the judgment of committees in other-cases where their authority is not binding.

[107] In many instances where the words "*alms*" and "*charity*" are both used, we are to consider it as mere tautology, a thing not very uncommon in parliamentary language.

If "*alms*," according to the fair meaning of the word, includes all charities; if such an interpretation of it is authorised by the sober and reasonable decisions of the House; and if *Harpur's charity* has been particularly so denominated by the founder, (since in his deed of gift he refers to the letters patent where *alms* is the only word used) by the legislature, and by the trustees of the charity, we must infer, first, that all charities were meant in the determination of 1690; and, secondly, that *this* charity more particularly must be construed to be within the meaning of that determination: but, if this is so, the usage of which evidence has been given, as it is posterior to the determination, will be of no avail; especially when it is considered that, till the expiration of the second lease in 1761, the surplus money must have been so small, and so few must have partaken of it, that it could not be of much consequence at any election to object to their votes.

(1) 2 Geo. II. cap. 24.

It has appeared that, in the bill for regulating this charity, a clause was at first inserted, declaring that the persons receiving it, should not thereby be disqualified from voting, but that clause was rejected (1). Is not this a decision of the legislature itself that they are disqualified?

The reasons which have been given for the disqualification occasioned by the receipt of parish pay, are equally applicable to this charity; for however improperly it may have been distributed in some particular instances, yet the true objects of it, according to the spirit both of the donation and the regulating statute, are persons who are in the same indigent and dependent situation with those relieved by the parish.

The counsel for the petitioners said, in reply,

That they had admitted that, in some cases, the house had decided that particular *charities* disqualified, after there had been determinations where in the disqualifying part, the word "*alms*" alone was used; but that no such instances could be found, where there was a constant usage in favour of the votes of the persons receiving the charities; and that, as to the usage in this case, having been proved as far as living memory or reputation goes, it was, according to the reasoning of the counsel for the sitting members in the former part of the case (2), to be presumed to have been always so. That the most reasonable way of understanding the cases just mentioned was, to suppose that, although by the

[109]

(1) *Supra*, p. 96. (2) *Supra*, p.

first general determination, *alms* and not *charities* were mentioned, yet the House had afterwards, *on evidence of the particular custom of the place*, decided that certain charities did disqualify, and not on the idea that they were comprehended under the word "*alms*" in the prior determination. That, before the 2d of George the Second, it was competent to the House to make such subsequent decision extending the disqualification beyond that contained in the first, without considering the second as *explanatory* of the first; and that the instances which had been adduced happened before that statute took place.

[110] That the amendment of the act of Parliament for regulating the charity had only left the law as it was before, and that the clause was thrown out because it is an established rule, in bills of that sort, not to say any thing of general rights. That if the legislature had meant to declare that Harpur's charity disqualifies, they would have inserted a direct clause for that purpose.

The arguments on this question being finished, the Committee deliberated for some time among themselves, after which, the counsel being called in, the Chairman said he was directed to inform them,

" That the Committee were of opinion, that
 " persons receiving Sir William Harpur's charity
 " are not thereby disqualified, within the meaning
 " of the determination of 12 April, 1690, from
 " voting

" voting for members of Parliament for Bedford *."

Vth Point.] The counsel for the petitioners then proposed to add 36 voters (inhabitants and householders) to the poll, who had been rejected because they had come into the parishes where they reside in Bedford with certificates from other parishes.

They said,

[111]

That a certificate does not put a man in the situation of a pauper, being only an eventual indemnity to the parish where he comes to dwell, in case he should, at any future period during his residence there, become an object of parish-relief; that a person therefore worth a hundred thousand pounds may have a certificate; and that it has nowhere been holden that a certificate is a general disqualification in all boroughs, although in some, as Taunton (1), it is so, by the peculiar usage of the place†.

The

{* The same decision took place with respect to this charity, in a Committee on the case of Bedford in 1792.]

(1) *Vide supra*, Case of Taunton, vol. 1. p. 373.

[† In the case of Leicester, 8 Feb. 1705-6. vol. 15. p. 136. col. 2. it was resolved by the

Committee, and agreed to by the House (ib. p. 137. col. 1.)

" That persons living in the
" borough of Leicester, by certificate, not having gained a
" settlement by renting 10l.
" a year, or serving in an annual office, are not entitled,
" by paying scot and lot, to vote in the election of burgesses to serve in Parliament
" ment

The leading counsel for the sitting members admitted this, and, after some struggle by the other, it was *agreed*, that the votes rejected on this ground should be added to the poll.—And the counsel for the sitting members also admitted, That, in consequence of the resolution of the Committee relating to Harpur's charity, the majority *then* stood in favour of the petitioners; but they informed the Committee, that they intended to object to many votes which had been received in favour of the petitioners. On this, the counsel for [112] the petitioners proceeded to endeavour to add other votes to the poll which had been rejected by the returning officers, and then closed their case, by evidence tending to prove bribery on the sitting members.

Then the counsel for the sitting members went through their evidence and arguments on several new heads of objection.

The different points in this last part of the case, and the evidence and arguments concerning them, were as follows;

The counsel for the petitioners endeavoured to support, and the counsel for the sitting members objected to, the votes of,

“ment for the said borough,” to confine the disqualification
It should seem, by the words of to the *lex loci* in that case, and
the resolution, that the Com- yet there is no evidence of
mittee, and the House, meant usage stated.]

Vith

Vith Point.] 1. Persons having received of a charity called *Hawes's* charity.

VIIth Point.] 2. Persons having received of a charity called *Welborn's* charity.

VIIIth Point.] 3. The master and brethren of a hospital called *St. John's* hospital.

IXth Point.] 4. *Freemen* who had received parish relief within a year before the election.

Xth Point.] 5. *Freemen*, who had an *inchoate* [113] *right* to their freedom, but were admitted in a particular manner different from the customary mode of admission for such freemen, and within a year before the election.

(There were six of this description who had tendered their votes, and had been rejected.)

The nature of *Hawes's* charity appeared to be this. Certain lands were left by one *Hawes* for the use of the poor of the parishes of *St. Mary* and *St. Paul* in *Bedford*; of the yearly profits of this land two thirds are to be distributed yearly *in bread* to the poor of the parish of *St. Paul*, and one third to those of the parish of *St. Mary*.

Welborn's charity was founded in the year 1716, when one *Robert Welborn* left a close, now of the value of 4*l.* 10*s.* *per annum*, to the ministers and *overseers of the poor* of *St. John's* parish in *Bedford*, to be distributed to the poor on New-year's day. It appeared that the practice is to distribute it in sums of three or four shillings to each person,

St.

St John's hospital was founded in the year 980, by one Robert de Parys, for six poor men to pray for his soul and the souls of several of his relations, and to attend divine service. It was a sort of chantry, and is now in every respect a corporation. The rector of the parish where it lies is master, there is a common seal, and the brethren, as they are called, are parties to all leases made of their land. Since the year 1606, in consequence of an order of the King and Council, made upon a petition for that purpose, they receive each nine pence a week from the revenues of their land.

It was proved that usage and reputation were in favour of the votes of those three classes, and that they are often rated to the poor;—that the bread of Hawes's charity is mostly received by wives and children.

As to the freemen rejected because admitted within the year, although they had antecedent titles, it was proved, that the custom of Bedford is to admit freemen, *having previous titles* at the court-leet; that *honorary* freemen, on the contrary, are often admitted at a common-council; that when men with antecedent titles are admitted at a common-council, as such admission is not demandable of right, but is matter of favour in the corporation, and on such occasions there is often no enquiry or proof made of a previous title, even if the persons admitted have it, they are understood to wave the benefit of that title, and are considered merely as *honorary* freemen.

It

It was contended on the part of the petitioners,

That, as to Hawes's and Welborn's charities, there could be no distinction made between them and Harpur's charity; that they are alike derived out of land, and appropriated to similar uses; that it would be a fraud and surprize on the persons who received them on the supposition that they would not thereby lose their votes, having never heard that those charities would disqualify, to declare *them* now to be disqualified, and thus deprive them of their franchise by an *ex post facto* decision. That no reasonable person can suppose, that persons previously entitled to vote, would have accepted [116] either a sixpenny loaf, or three or four shillings, if they had imagined that this would annul their votes. That, with regard to Hawes's charity, as it is generally given to women and children (1), it would be particularly unjust that their act in receiving it, should destroy the votes of their husbands or fathers who might not be privy to their having received it. That, as to the brethren of St. John's hospital, they are a corporation, and have a *permanent* interest in what they receive from the profits of their land: That they are like fellows of colleges, and, like them, would be entitled to vote even at county elections, as deriving an income for life out of lands: That, if one of them were turned out, he might have a *mandamus* to reinstate him: That what they receive, therefore, is of a

(1) *Supra*, p. 114.

certain

certain and stable nature, and does not subject them to influence like the uncertain fluctuating hopes of parish relief: That they may be compared to Chelsea and Greenwich pensioners; and that the former were holden, in the case of Taunton, not to be disqualified within the meaning either of the words "*alms*" or "*charity*," by what they receive from the hospital (1).

[117]

(1) They seemed to give up the votes of the freemen who had been made within the year, as being within the meaning of the statute of George the Third.)

As to the freemen who had received parish relief within the year they *now* (2) argued,

That these words of the last determination, "*not receiving alms*," could not be carried back to *freemen* since the Committee had determined that the previous words "*being householders*," do not apply to them; and though alms, by the common law, disqualify men who acquire an accidental right to vote by *inhabitancy*, none of the advantages of a *franchise* purchased by a man, or by his parents, for money, or by serving an apprenticeship, can be afterwards annihilated by a change of situation and pecuniary circumstances.

[118]

On the head of bribery, some evidence was

(1) Case of Taunton, *supra*, should have said, "*determined*" vol. 1. p. 373. *Nota*. In the "*by the Committee*." this point was "*settled*." I

(2) *Vide supra*, p. 75.

given

given to show that the corporation, when there was question of a certain gentleman's being a candidate, had required of him as a previous condition to his being supported by them, that he should deposit a considerable sum of money. But this was explained to have been intended merely as a security for the payment of the necessary expences of the election, and not as a corrupt consideration or gift for their benefit; and there was no proof that ever such a proposal had been made to the sitting members, or that any money had either been given or promised by *them*.

The counsel for the sitting members insisted,

That they still were at liberty to contest the right of men receiving any other charity but Harpur's:

That they might, and did suppose, that the Committee had decided *specialy* upon that charity, on the ground of its great value, which rendered the receiving it an object even to persons in easy circumstances. They then went over nearly the same ground of argument which they had formerly taken. They said, that Welborn's charity is distributed by the overseers of the poor; That it stands in the place of parish pay to those who receive it; That *alms*, as the counsel for the petitioners had contended in the beginning of the cause, is a general common law disqualification if received within the year (1), and therefore affects persons

[119]

(1) *Supra*, p. 75.

claiming

claiming to vote as freemen, as well as inhabitants; That it does not annihilate any part of their franchise, but only suspends the exercise of their right of voting while they are in that dependent state, when the law intends them to be incapable of giving a free suffrage.

There were some other votes objected to on both sides, as given by persons who were not householders, who lived in parish houses, &c. and some of them were given up. It will be observed, that with regard to these, the fact, not the law, was disputed.

[120] After the counsel on both sides had finished, which they did on Tuesday, the 21st of March, the Committee desired that states of the poll, and of the numbers of votes objected to on each of the different heads, should be agreed on, and delivered in, by the agents on each side.

From those states it appeared,

1. That the original poll, including the honorary non-resident burgesses and freemen, whose votes had been declared by the Committee to be legal, was,

For Sir William Wake	- - -	527
For Mr. Sparrow	- - -	517
For Mr. Whitbread	- - -	429
For Mr. Howard	- - -	402

2. That, including all the votes which the
counsel

counsel for the petitioners had endeavoured to establish, the numbers would have been, '

For Whitbread	-	-	-	-	611
For Howard	-	-	-	-	580
For Wake	-	-	-	-	541
For Sparrow	-	-	-	-	530

3. That after striking off those who received [121] Welborn's charity, the freemen receiving parish relief, those who had been admitted to their freedom within the year, and the particular votes objected to as given by inhabitants not householders, &c. the numbers would have stood,

For Whitbread	-	-	-	-	568
For Wake	-	-	-	-	541
For Howard	-	-	-	-	537
For Sparrow	-	-	-	-	529

4. That, if persons who received Hawes's charity had also been struck off, the numbers would have stood,

For Wake	-	-	-	-	527
For Sparrow	-	-	-	-	519
For Whitbread	-	-	-	-	467
For Howard	-	-	-	-	441

5. Or that, if those votes had been left on the poll, and those of the freemen who had received parish relief added, the numbers then would have been,

For Whitbread	-	-	-	-	574
For Howard	-	-	-	-	542
For Wake	-	-	-	-	541
For Sparrow	-	-	-	-	530

[122]

As the different points in what remained case, after the decision concerning Harpur rity, were not argued and determined separately, the Committee did not communicate their resolutions on those points to the counsel, but are contained in the minutes taken by the and delivered to the parties, from whence transcribed them, *viz.*

1. The question being put,

That the persons who voted at the last e for Bedford having received Hawes's charity thereby disqualified ;

It was resolved in the negative*.

2. The question being put,

That the persons who voted at the last e for Bedford having received Welborn's c were thereby disqualified ;

It was resolved in the affirmative†.

[* This decision was confirmed in the Committee on Mr. Payne's petition in 1792.]

[† But, in the Sudbury case, reported by Mr. *Philipps*, and afterwards, on very solemn argument, in the Colchester case, April 1789, it was decided, that certain charities, entirely similar to *Welborn's* charity, do not disqualify. These charities in Colchester are called *Dobby's* charity, *Lady Gressfield's* charity, *Jeremiah Daniell's* donation, *Coxe's* donation. In

March 1791, the Committee in the case of *Steyning* determined, that a charity called *White-horse charity*, disqualify. In the same case, in 1792, a donation, similar to *Hawes's* charity in Bedford, was held to disqualify. In the case of Colchester, in 1792, (2 Fra 4) persons admitted into the parish pest-house when with the small-pox, to prevent the infection from spreading, were held not to be disqualified.]

3. The question being put,

That the master and brethren of St. John's hospital were disqualified from voting at the last election for Bedford;

It was resolved in the negative.

4. The question being put,

That the word "*alms*" in the resolution of 1690, refers to burgesses and freemen, as well as to inhabitants householders of Bedford;

It was resolved in the affirmative.

5. The question being put,

That the six persons who tendered their votes at the last election for Bedford, being admitted within the twelvemonth by the common council, had a right to vote;

It was resolved in the negative.

The Committee likewise resolved,

That they would not reject any person's vote (not otherwise disqualified) for receiving alms, provided he had not received the said alms within the year (B).

On Thursday, the 23d of March, the Committee, by their Chairman, informed the House, that they had determined,

That Sir William Wake, Bart. was duly elected; [124]
and,

That Samuel Whitbread, Esq. the petitioner, was duly elected, and ought to have been returned (1).

(1) Votes, p. 420, 421.

NOTES

ON THE CASE OF

B E D F O R D.

Note
(A)

PAGE 77. (A.) On the 26th of April, Mr. Whitbread presented to the House, a petition of divers inhabitants householders of Bedford, setting forth; That the mayor, aldermen, and common-council had, at several times, assumed a power of making an unlimited number of burgesses and freemen, strangers, and foreigners, who never served any corporate office, exercised any trade, or contributed to any rate or assessment, within the town, for the sole purpose of their voting at elections for members of Parliament; That particularly in the month of September, 1769, they had made upwards of five hundred, and a considerable number every year since; and that the like evil practice, if continued, would totally annihilate the ancient right of election to the petitioners, the whole number of inhabitants, householders, who have a right to vote, being computed not to exceed five hundred and forty; praying, therefore, that the House would grant such relief as might be expedient for the present, and prevent the like practices for the future. Votes, p. 573, 574.

[126]

This petition was ordered to be referred to a Committee to enquire into, and state the matter of fact to the House.

On the first of May, Sir William Wake, now Mr. Whitbread's colleague, after complaining that the petition had been presented by a surprize on him, and the non-resident elector

electors of Bedford, and that he had received no notice that such a thing was intended, moved that the order for referring it to a Committee should be discharged; but the question being put on that motion, it passed in the negative. (Votes, p. 603, 604.) On the 17th of May, however, (Votes, p. 699.) nothing having been done by the House in consequence of a report which had been made by the Committee some time before, the consideration of the report was put off for two months, before which time the House was prorogued for the summer.

Note

(A)

P. 92, 123. (B.) As a person who is at present in indigent circumstances may afterwards become affluent or independent, and *vice versa*, it cannot be supposed that the receipt of alms, or of any particular charity (in cases where that disqualifies) should operate at an unlimited distance of time, nor on the other hand, that, where the right of election is in those who pay scot and lot, or to church and poor, such payments should produce a qualification, though made at any remote period before the election. Some line must be drawn in both instances, and that line, by the established custom of Parliament, seems to be one year before the election; unless in particular cases, where, either by special usage, a determination of the House (as in the case of Reading, *supra*, p. 105), or an act of Parliament (as in London), the disqualification by alms is extended to two years.

Note

(B)

[127]

P. 105. (C). The counsel for the sitting members were going to state the nature of Mr. Bedford's charity, in Aylesbury, from their briefs, but this was objected to, unless they would produce legal evidence of it. It is stated in the Journals.

Note

(C)

" 7 Feb. 169⁸. The Committee reports, That it appeared that John Bedford, by his will, made the 12th July, 9 Hen. VII. allotted lands of about 120l. a year, for the repair of the highways about Aylesbury, and to be dealt in *alms*, to blind people, crooked, sick, and poor people. That, in 39 Eliz. there was an act of Parlia-

Note
(C)

“ ment for settling this charity, by which the said trust
 “ vested in nine persons, who are made a corporation, a
 “ empowered to act in the disposition of the said charity
 “ according to the will of Mr. Bedford, and are to have
 “ perpetual succession, by the name of the Surveyors of the
 “ highways of Aylesbury, in the county of Bucks. That
 “ this charity, accordingly, every St. Thomas’s day,
 “ distributed by the feoffees, to the poor of Aylesbury,
 “ two shillings, half a crown, or three, four, or five shil-
 “ lings a-piece, or such small sums, and is commonly con-
 “ tinued to the same persons for their lives, but that is dis-
 [128] “ cretionary in the feoffees to change the persons as they
 “ think fit. And that, for this charity, every three years
 “ they account to the bishop of Lincoln (1).”

Surely this entry in the Journals was evidence to be read
 to the Committee.

(1) Journ. vol. xii. p. 487. col. 1.

XVI.

THE

C A S E

Of the BOROUGH of

S U D B U R Y,

In the County of SUFFOLK.

The Committee was chosen on Friday, the 17th of March,
and consisted of the following Gentlemen :

Fred. Montagu, Esq. Chairman, -	} Members for	Higham Ferrers
Philip Yorke, Esq. - - - - -		Helleston
Richard Benyon, Esq. - - - - -		Peterborough
Thomas Powys, Esq. - - - - -		Northamptonsh.
Right Hon. Tho. Townshend, -		Whitchurch
Robert Vyner, Esq. - - - - -		Lincoln
George Byng, Esq. - - - - -		Wigan
Thomas Whitmore, Esq. - - - - -		Bridgenorth
Charles Morgan, Esq. - - - - -		Breconshire
Sir Roger Mostyn, Bart. - - - - -		Flintshire
Hans Sloane, Esq. - - - - -		Newport, Hants
Charles Dundas, Esq. - - - - -		Richmond
Nathaniel Ryder, Esq. - - - - -		Tiverton

NOMINEES,

Of the Petitioners :

James Grenville, Esq. - - - - -	Buckingham
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Of the Sitting Members :

Beaumont Hotham, Esq. - - - - -	Wigan
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PETITIONERS.

Sir Walden Hanmer, Bart. on behalf of himself and Sir
Patrick Blake, Bart. (absent in the Island of St.
Christopher's.)

Certain Electors for the Borough of Sudbury.

Sitting Members :

Thomas Fonnereau, Esq. Philip Champion Crespigny, Esq.

COUNSEL,

For the Petitioners,

Mr. Lee, Mr. Murphy.

For the Sitting Members,

Mr. Cox, Mr. Wilson.

THE
C A S E

Of the BOROUGH of

S U D B U R Y.

ON Saturday, the 18th of March, the Committee being met, the two petitions were read, containing, in substance, the same allegations, namely; That a great many legal voters, who tendered their voices for Hanmer and Blake, had been rejected, although they had been for many years in the possession and exercise of their rights, to the knowledge of the mayor, and of Fonnereau one of the sitting members, in whose favour, and at whose request, many of them had frequently polled at former elections; That many, whose claim stood in the same predicament, had been admitted to vote for the sitting members; That others who were not legally qualified, had also been admitted to vote for them; That the fair majority of legal votes was in favour of the petitioners; But, that William Strut, the mayor and returning officer, had acted partially and corruptly before, and during the poll, and had declared the sitting members duly elected,

[132]

and had returned them; And that money was given by the fitting members, or their agents, in way of bribe or reward, to persons who voted for them at the election (1).

The last determination of the right of election being read, appeared to be as follows :

6 December, 1703. Resolved, "That the right of election of burgessees, to serve in Parliament for the borough of Sudbury, in the county of Suffolk, is only in the sons of freemen, born after their fathers were *made* free, and in such as have served *seven years* apprenticeships, or are made freemen by *redemption* (2)."

Then the standing order of 173 $\frac{1}{2}$ was read (3).

[133] At the opening of the cause, the counsel for the petitioners contended, that the resolution of the 6th Dec. 1703, was merely explanatory of one of the 19th of January, 170 $\frac{2}{3}$, in the following words :

Resolved, "That the sons of freemen, born after their fathers were *made* free, and those that have served apprenticeships in the borough of Sudbury, in the county of Suffolk, have a right to vote in the election of members to serve in Parliament for the said borough, *without an admission, in form, to their freedom*, or taking the oath of freemen (4)."

(1.) *Yotes*, 6 Dec. 1774, p. 31, 32.

(3) *Supra*, vol. i. p. 99.

(4) *Journ.* same vol. p. 111.

(2) *Journ.* vol. xiv. p. 245. col. 2. p. 121. col. 1. col. 1, 2.

A great number of persons, who tendered their suffrages for Hanmer and Blake at the election, were rejected, because they did not produce evidence of their admissions to their freedom, enrolled upon stamps, in the books of the corporation. If the right of election was to be taken to be as declared in the resolution of January, 1702, no formal admission was necessary; that objection must fall to the ground; and it would only be requisite, in order to establish the votes of those persons, to show that they came within the description of one or other of the two classes mentioned in the resolution. [134]

They said that this would appear to be the case from the history of the two resolutions, as it is contained in the Journals; That the right of election for this borough was, during the last century, in a very precarious uncertain state; That sometimes the exclusive right was claimed and exercised by the magistrates, or governing part of the corporation, and, on other occasions, the freemen at large were admitted to vote; That, in short, every election was a struggle, with various success, between the former, who were called the *Bench*, and the latter, called the *Floor*; That, at the election in 1702, one Benjamin Carter, the mayor and returning officer, declared, in consequence of an order he had obtained from the governing part of the corporation to oblige all persons claiming votes to *enroll* themselves, that no man should be suffered to poll whose name was not enrolled according to that

that order, and for want of such enrollment, re-
 jected several who had voted, at previous elections,
 for thirty years backwards (1); That it was on the
 occasion of a petition of the unsuccessful candidate,
 at that election, that the first of the two resolutions
 was made; That the election being declared to be
 void (2), on the ground of bribery, a new contest
 ensued between the same parties, and was followed
 by a new petition of the former petitioner; That
 in this second cause, the *only* point was, Whether,
 according to the right of election declared by the
 first resolution, those who had served *five* years as
 attorneys' clerks, had a right to vote (3); and that
 the resolution of 6 Dec. 1703, being made to de-
 cide that point, must, by the fair construction, be
 considered, as merely an explanation of the former,
 as to the *number of years* necessary to such an ap-
 [136] prenticeship as would bestow a right to vote, *that*
 having been left undefined in the first.

The counsel for the sitting members insisted,

That the latter resolution was to be considered
 as a *complete independent* determination; That there
 is no reference in it to the former, which in
 explanatory resolutions there always is; And that,
 so far from being merely a commentary on the
 former, it declares the right of voting in a class of
 persons not at all mentioned there (4); But, that,

(1) Journ. vol. i. p. 119.
 col. 2.

(3) Journ. *loc. cit.* p. 244.
 col. 2.

(2) Journ. *loc. cit.* p. 121.
 col. 1.

(4) *Viz.* Freemen by re-
 demption.

if the resolution of 6 Dec. 1703, is independent of the other, it is the last determination within the meaning of the statute; That persons, therefore, claiming to vote under that determination, must prove themselves to be completely freemen, which they cannot be without admission; and that the only legal evidence of admission is the enrollment thereof upon stamps in the books of the corporation.

The counsel on each side having argued this point, were directed to withdraw; and after the Committée had deliberated some time among themselves, they were called in again, and informed [137] by the Chairman, that the Committee had resolved (*generally,*)

That the counsel for the petitioners should produce evidence to show by what right the rejected persons claimed to vote.

After this preliminary decision, the whole case was gone into on the part of the petitioners.

They endeavoured to show;

1. That *honorary* freemen, of whom a great number had polled for the sitting members, had no right to vote;

2. That the persons who had been rejected because they did not produce the enrollment of their admission upon stamps, had a right to vote;

3. That the mayor's conduct had been such as merited the censure of the Committee, and the House.

(13) They stated that they could prove a very public

public distribution of money among the voters for the two sitting members *after* the election, but as they did not say they had any proof either money being given, or promises of money being made by them *previous to, or during*, the election the Committee *seemed* to think this would not affect their seats; and no evidence was gone in on this head.

The following facts were all admitted or proved.
1. On the first point.

Sudbury is a borough by prescription. It was incorporated by Queen Mary, and began to send members to Parliament in the first year of Queen Elizabeth. From that time, the returns are without interruption.

The corporation consists of a mayor, six aldermen, twenty-four capital burgessees, and an indefinite number of freemen.

Till the year 1772, there are not above five or six instances to be found in the books of the corporation, of persons admitted to their franchise without a title acquired either by birth, servitude or redemption. Those instances are of men who were candidates to represent, or members for, the borough, and were admitted out of compliance with the law, but who cannot be shown ever to have exercised any franchise as members of the corporation. They are all within the last hundred years.

In 1772, the governing part of the corporation, the majority being in the interest of Fonnereau, made an entry in their books (27 F
import

importing, that they have power to admit men claiming by any of the above titles, and also gratuitously, or *by favour*, without any previous title, or consideration in money. Accordingly, the next day (28 Feb.) 170 were admitted at once, of whom 130 had no right either by birth, servitude, or redemption. Before that period, this power of making *honorary* freemen had never been exercised in the borough (except, as has been said, out of compliment to candidates or members) nor was it understood to exist.

2. On the second point.

The constant usage has been to permit persons having a title by birth to exercise all the rights of freemen, *without any enrollment upon stamps*, and even without an entry of their admission in the books of the corporation. Those rights are, chiefly, [140] the right of *turning on* their cattle on a common belonging to the corporation, the right of carrying on different trades in the borough, and the right of voting for members of parliament.

None but freemen have the right of *turning on* (as they call it), and, when the time for *turning on* comes, the mayor, town-clerk, and some others of the corporation, attend at the common-gate in a sort of court, and the freemen with their cattle, pass in review before them. Books are kept of the proceedings at those courts, in which there are many entries like the following,

11 May, 1772, Ordered, " That the cattle belonging to the *freemen* of this borough be put on
" the

“ the common of this borough.” (on a day specified in the order.)

If any doubt arises about the freedom of an one, it is enquired into, and, until it is proved that he is entitled by birth, servitude, or redemption he is not permitted to *turn on*.

[141] Many freemen have not the right of *turning on* but none but freemen can have that right. The price of freedom, by itself, when acquired by purchase, is less than the price of freedom and common united.

7 May 1730, Ordered, “ That, if *A. B. can show that he has the freedom of the town*, he shall have “ the freedom of the common for six guineas.”

The prices of the right of common are paid to the treasurer, and the surplus of the money, after defraying the necessary expences, is disposed of at the moot-hall, on a day fixed by the mayor, *to freemen not having cattle to turn on, and freemen's widows*. It is called *cummunage-money*, and generally amounts to about 2s. or 2s. 6d. a head.

Reputation that the father, (at the time the son was born), was free of the borough, has always been considered as sufficient evidence of the person himself being a freeman. When a man was formally admitted, the custom has been to give him a slip of parchment, signed by the mayor, or town-clerk. This is called the docket of his freedom. But there are hardly any instances of its being stamped. There are several entries in the books, by which it appears, that men have been admitted to their freedom

freedom on its being proved that their fathers were free at the time of their birth, by the oaths of their neighbours, or when their names were found on the communage-books, or in old polls, without any enquiry being made whether there was any enrollment upon stamps of their admission.

At the last election, 388 were rejected. The names of a great many of those appear on the communage-books as exercising the right of common for above thirty years. By the parole testimony of one Griggs, a man of forty-nine years of age, who has been resident all his life at Sudbury, and by a comparison of the respective polls, it appears, that of the 388, 26 voted in 1734; 83 in 1747; 137 in May 1754; 187 in 1761; and, 281 in 1768. In 1734 Griggs lived with an uncle, who took an active part in the election of that year. He himself was constable in 1747, and acted [143] as check-clerk at the last election. He knows the major part of the rejected voters personally, and never heard any objection to their exercising every other franchise of freemen.

In 1762, the mayor, aldermen, and capital burgesses were enrolled upon stamps in the corporation books, but they never insisted, at that time, nor till several years afterwards, that the other freemen should be so enrolled; on the contrary, one Stockdale Clarke, who had acted as town-clerk from 1749 to 1771, said; that when he first came into that office, he had proposed to the corporation to have the freemen

freemen enrolled upon stamps, but that they told him the determination of the House of Commons had rendered that unnecessary; that he had consulted some of the leading persons in the town, who were not of the corporation, and they gave him the same answer; and that the officers of the stamp-office having threatened him with a prosecution he did not take care to have the admissions of the freemen enrolled on stamps, he had sent them word that the corporation did not think there was any occasion for it. This was also proved by Thomas London, an inspector in the stamp-office, who had formerly lived twenty-one years at Sudbury had been mayor, and said he did not recollect an instance of the formal admission of a person but the son of a freeman, but many of persons becoming free by servitude or purchase.

[144]

In 1768 there was a contest between three of the present candidates,—the two petitioners and Mr Fonnereau. The numbers on that occasion, stood—For Blake 618; Hanmer 526; Fonnereau 25. Although, as has been just mentioned (1), 281 the persons now rejected polled at that time; and Mr. Fonnereau petitioned; yet neither at the election, nor in his petition, was there any objection made to their votes, many of which were given for him. The chief ground of his petition was bribery. His counsel, indeed, called a witness to prove that several of Blake and Hanmer's voters were not leg

(1) *Supra*, p. 142.

freemen, as not having been admitted upon stamps; but the House would not permit this evidence to be gone into, because foreign to the allegations of the petition (1).

After that election, the governing part of the corporation determined to insist that all freemen should be enrolled upon stamps; and in 1771, they fixed the 29th of October for receiving the claims of those who desired to be enrolled. On that day, the court being met for that purpose about nine o'clock in the morning, several hundreds of people assembled. The first person who demanded to be enrolled, claiming on the ground of being the son of a freeman born after his father was made free, the town-clerk was ordered to search the books to see if the father was enrolled upon stamps prior to the birth of the son, and no such enrollment being found, he was rejected. The father was then dead, and had exercised all the franchises of a freeman during the whole of his life, which the claimant was prepared to prove. The refusal to enroll this man [146 produced a great clamour, and the mayor dissolved the court; but the crowd detained him and the other magistrates in the hall till nine at night, when a sort of compromise took place through the interposition of Hanmer, the mayor consenting to enroll three that night, and to hold courts afterwards for the purpose of enrolling others. A proposal was that day made to the claimants, that a

(1) Journ. vol. xxxii. p. 705. col. 1.

select committee of the magistrates should be appointed to enquire into their titles, and make report thereof to the whole body; but this was not accepted. Some of the persons concerned in the detention of the mayor were prosecuted by information, and, on their trial at the assizes, were convicted. Afterwards a select committee was appointed for the above purpose, the mayor and two capital burgesses to be a quorum. All the members of that committee voted for the fitting members at the last election. At several subsequent courts holden for the purpose of enrollment, many of those who had been rejected on the 29th of October, 1771, put in their claim again, and were again rejected on the same ground, and after a similar enquiry, as before; particularly on the 28th of February, 1772. Of the number of 170 already stated to have been admitted on that day (1), 40 claimed by birth or servitude: they were friends of Fonnereau, and voted for him and the other fitting member at the last election; and as to *them* no enquiry was made in court into their titles. Of the whole number of 170, many were not present. They were proposed in lists of thirty and forty, and questions put and carried upon each entire list, that they should be admitted and enrolled. Some of the magistrates were heard by the witnesses to say that they would enroll none but the friends of Fonnereau.

[147]

(1) *Supra*, p. 139.

A *mandamus* was brought against the corporation by one Snee, to be admitted and enrolled as being the son of a freeman, born after his father was made free. The same attorney (Mr. Fonnereau's agent) conducted this case both for the plaintiff and defendants. He prepared the briefs, and instructed the counsel, on both sides. On the trial, which came on before the Lord Chief Justice of the King's Bench at the sittings after Trinity term, 1771, Snee only brought evidence to shew that he was the grandson of a freeman, and did not go into any proof that his father was free, which he might have proved; a verdict was necessarily found for the corporation. This Snee was afterwards made an *honorary* freeman, and voted at the last election for Fonnereau and Crespigny. [148]

3. On the third point.

Just before the election, the mayor had a thousand copies printed of an extract from the Durham act, 3 Geo. III. cap. 15. containing the clause disqualifying freemen admitted to their freedom within the year, and mentioning the penalty of one hundred pounds inflicted by the statute if they shall presume to vote, *but omitting the exception in favour of persons who have an inchoate title*. He had himself caused those papers to be distributed among the persons claiming to be enrolled. Some of them, taking the alarm, came to ask his opinion [149] whether they might vote without incurring the penalty, and received for answer, that they certainly

ly would be liable to it if they presumed to vote, and if not able to pay must go to jail. Two persons particularly swore, that it was this answer of his alone that prevented them from tendering their voices at the election.

The poll, as the town-clerk took it, by the mayor's directions, reduces the number of voters in the borough to about 253. At every former election since 1703 near 700 polled; Mr. Fonnerau himself had polled from 5 to 600 on former occasions.

No evidence was produced, on the part of the fitting members, to contradict the above facts; most of them were, in a manner, admitted. Their counsel seemed only to aim at shewing that, of the persons exercising the right of common, many received alms; and that the votes of men receiving alms have never been allowed in this borough. That last fact was acknowledged to be so by some of the witnesses called on the part of the petitioners.

[150]

COUNSEL for the Petitioners.

1st Point.] That *honorary* freemen (that is, those who have not acquired a title to their freedom by birth, servitude, or redemption,) cannot be legally made in Sudbury, according to the constitution of the borough, or, at any rate, that they have no right to vote in the election of members of parliament, appears both from the evidence which has been produced, and from the express words of the last determination. It has been shewn that the
books

books do not furnish a single instance of a person admitted a freeman, by favour of the corporation, till within the last hundred years; and the few examples within that time are of men to whom a nominal freedom was given as a mere unsubstantial compliment, and who, from their situation in life, must be presumed never to have claimed or exercised any of the rights of freemen.

In all cases, where it has been a question, whether honorary freemen have, or have not, a right to vote, the house of commons has proceeded on the evidence of usage. If by the custom of the place, it appeared that they always had voted, the house, in determining the right of election, has employed such general words as will comprehend them. If, on the contrary, the usage was against them, the determination has been so expressed as only to extend to freemen entitled by birth, servitude, or redemption. [151]

In the case of Chester, in 1747, the counsel for the petitioners insisted, "That the right of election was only in such citizens of the said city as are inhabitants within the said city, or the liberties thereof, and *admitted to their freedom within the city by birth or servitude*, and not receiving alms or any public charity." The counsel on the other side denied *that* to be the right, and stated it *generally* to be "in the freemen of the said city (1)."

(1) 2 Feb. 1747. Journ. vol. xxv. p. 498. col. 1.

C A S E X V L

They proposed to prove, but it was admitted, that several *honorary* and non-resident freemen had voted at the elections of mayors and sheriffs, and had served those offices, and that *honorary* freemen had] exercised trades in the city (1). On this the House,

9 Feb. 1747, Resolved, "That the right of election of citizens to serve in Parliament for the city of Chester, is in the mayor, aldermen, and common-council, of the said city, and in such of the *freemen* of the said city, not receiving alms, as shall have been commorant within the said city, or the liberties thereof, for the space of one whole year next before the election of citizens to serve in Parliament for the said city (2)."

In this case, as there was no evidence that honorary freemen had exercised the same franchises with those who acquired their freedom by an antecedent title, or by purchase, the determination made use of general words under which they are comprehended. But in that of Worcester, which happened at the very same time, as there was no such evidence in their favour, although the counsel for the sitting member contended that the right [153] was general, "in the *freemen*, not receiving alms (3)." The determination was,

11 Feb, 1747, Resolved, "That the right of election of citizens to serve in Parliament for the

(1) 9 Feb. Journ. vol. xxv. 304, 305. (3) Journ. vol. xxv. p. 501 col. 2.

(2) *Ibid.* p. 505. col. 1. 2.

“ city of Worcester, is in the citizens of the said
 “ city, not receiving alms, *and admitted to their free-*
 “ *dom, by birth or servitude, or by redemption,* in or-
 “ der to trade within the said city (1).”

These words are clearly exclusive of honorary freemen, or men made free gratuitously and without a previous title; but not more so than the words of the resolution of the 6th of December, 1703, with regard to Sudbury (2). Indeed, as one of the parties, both in the case of Chester, and in that of Worcester, contended for freemen in general, the difference in the language of the two determinations shows, that when the expression “*freemen*” is used *generally*, without any qualification as to the mode of acquiring their freedom, there honorary [154] freemen are meant to be comprehended; and, on the other hand, where such qualification is super-added, they are meant to be excluded. This alone is a demonstration that, according to the meaning of the last determination, honorary freemen cannot vote for members of parliament, at Sudbury.

(☞ This objection went to ninety-four persons, who polled for each of the two sitting members.)

[Ild Point.] If the resolution of the 6th of December, 1703, had been intended to alter, or repeal, that of the 19th of January preceding by which admissions in form were declared not to be neces-

(1) Journ. vol. xxv. p. 510. col. 1. (2) *Supra*, p. 132.

fary, as it followed it so recently, it would certainly have contained direct words expressive of such intended alteration. That the universal and uniform sense of the borough has been, that it did not alter or repeal it, is evident from the constant practice which has been proved to have obtained ever since.

[155] But the persons who were refused to be admitted to their freedom, and whose votes were rejected, because they could not show any admissions of their fathers enrolled upon stamps, are, independent of the words of the first resolution, within the words and the meaning of the second. According to those words, it is not necessary to prove any admission of their own, or to show that they themselves were *made* free. It is enough, that their fathers were, and they were ready to show when they demanded to be enrolled, at the courts holden on the 29th of October, 1771, and afterwards, that their fathers had, before the birth of the sons, and during the whole course of their lives, exercised and enjoyed all the franchises and privileges of freemen, as cummunage, trades within the borough, and the right of voting for members of Parliament; surely this was proof enough, that they (the fathers) had been *made* free. There is nothing concerning enrollment upon stamps necessarily implied in the expression, "*made free*." The mode of *making* freemen varies in different boroughs, and the constant practice in this borough has been not to require

[156] any formal enrollment. Must we not infer, that
the

the House, in speaking of persons *made free*, meant to refer to the established custom of the place, however irregular that may now appear to have been.

As so much stress is laid on the enrollment upon stamps in the books of the corporation, as if that were the only legal evidence of admissions to freedom, it will be necessary to take a view of the progress and changes of the stamp laws, as far as they affect this question.

The first of those was the statute of the 5th of William and Mary, cap. 21. It was entitled, "An act for granting to their Majesties several duties upon vellum, parchment, and paper, *for carrying on the war against France*;" and it enacted, "That, for every skin, or piece of vellum, or parchment, and for every sheet, or piece of paper, upon which any admission into any corporation, or company, shall be engrossed or written, the sum of one shilling shall be paid (1) and that such vellum, parchment, or paper, shall be stamped (2)." This statute was to remain in force four years, but the same duties were continued by statute 8 and 9 of William III. cap 20. § 12. [157]

The statute of the 9 and 10 Will. III. cap. 25, added, to the former, a new duty of one shilling on admissions, which were therefore to pay two shillings: Both by this statute and that of 5 William and Mary, it was enacted, That such admis-

(1) Sect. 3.

(2) Sect. 7.

fions should not be pleaded, or given in evidence in any court, nor be holden to be good, in law, equity, till they were stamped; and if they had been written without a stamp, the duty, and penalty of five pounds, were to be paid, and at this the stamp put upon them, before they could be pleaded, or given in evidence, or allowed to be good (1). By the act of the 9th and 10th William III. all instruments stamped under the former (5 William and Mary) were to be called in, and stamped again with a second stamp, and, by both instruments already written, and not stamped at all were to be brought to the office and stamped.

Thus the law stood on this subject, till the year 1765, when the act of the 5th of the present King made such alterations as will appear by stating the words of that act.

5 Geo. III. cap. 46. § 1. "Whereas great frauds are committed in the several duties of one shilling respectively imposed (among other duties) on admissions into corporations and companies by an act of Parliament, made in the fifth and sixth years of the reign of their late Majesty King William and Queen Mary, (intituled act, &c.) and by another act of Parliament, made in the ninth and tenth years of the reign of the said late Majesty King William the Third, (intituled, &c.) owing to the said duties bei

(2) 5 Will. and Mary, cap. 21. § 11. 9 and 10 Will. cap. 25. § 59.

"charg

“ charged on the admissions, and not on the entries,
 “ minutes, or memorandums, made of such admis-
 “ sions in the court books, rolls, or records, of such [159]
 “ corporations or companies,—be it enacted—that
 “ from and after the 5th day of July, one thousand
 “ seven hundred and sixty-five, the several duties
 “ upon admissions into corporations and compa-
 “ nies, granted by the said acts, shall cease and
 “ determine.

“ § 2. And that from and after (*the same date*)
 “ in lieu thereof, the duty hereinafter mentioned
 “ be charged, imposed, and paid, throughout the
 “ kingdom of England, dominion of Wales, and
 “ town of Berwick upon Tweed; that is to
 “ say:

“ For and upon every skin or piece of vellum, or
 “ parchment, and for every sheet or piece of pa-
 “ per, upon which shall be ingrossed, written, or
 “ printed, in the court-book, roll, or record, of any
 “ corporation, or company, any entry, minute, or
 “ memorandum, of any admission into any corpo-
 “ ration or company, the sum of two shillings.

“ And if any town-clerk, or other proper officer,
 “ shall neglect or refuse to make such entry, mi- [160]
 “ nute, or memorandum, of such admission, upon
 “ the proper duty, in the court-book, or on the
 “ roll, or record of such corporation or company,
 “ within one month after any person shall be ad-
 “ mitted into the same, he shall, for every such
 “ offence, forfeit the sum of ten pounds.”

The

The other provisions relating to stamps in the former acts are re-enacted by this (1), but it is to be observed, that it does not, like the former, require that *former admissions* should be re-stamped; or that they should be entered in the books.

[161] The greatest part of the rejected voters were in the uncontroverted enjoyment of their freedom before 1765. They were not, therefore, called upon to prove their freedom, by stamped admissions, in the books of the corporation, and the objection made to them by the returning officer at the poll falls to the ground. As to them, the true evidence would be admissions on slips of parchment duly stamped, but that evidence the corporation took care should never be forth-coming, because they held it unnecessary under the resolutions of 1702 and 1703, to give admissions upon stamps. Slips of parchment, importing that the bearer was a freeman of Sudbury, but not on stamps, were the only instruments in use. In their books, however, relating to rights of common, they have kept annual lists of the freemen, who put their cattle on the common, and also of those freemen who, not having cattle, received their share of the cummunage-money. Those books need not be stamped by any law whatever, and, therefore, may be read in evidence. To this no reasonable objection can be made, nor to the parole testimony which has been given before the Committee. It has never been

(1) Sect. 42.

determined,

S U D B U R Y.

determined, that, according to the stamp laws, when no admissions on stamps are to be found, other evidence shall not be admitted to prove a man to be a freeman.

The general rule of law requires that evidence shall not be admitted of any thing of which better evidence might have been procured, and is not produced ; but, when what would have been better evidence, if it could not have been procured, cannot be found, it is also a rule of law, that the next best evidence shall then be admitted. And this rule, being derived from the principles of common sense, is not peculiar to the laws of this country. It is a rule of the civil law, with which one of the sitting members must, from his profession (1), be acquainted. On the part of the rejected voters, the words of Cicero (no mean authority in that law) on behalf of a client whose case was very similar to theirs, might have been used with great propriety. The admission of Archias the poet, to the freedom of the city of Heraclea, being called in question, he was ready to prove it by the same sort of evidence which the freemen of Sudbury offered to produce, but was told that this was not the best evidence, and that he must show the enrollment of his admission in the books of the city, although it was notorious that those books had been consumed by fire, and did not exist, on which Cicero, who pleaded his cause, observed, "*Hic tu tabulas Hera-*

(1) Mr. Crespigny is King's Professor.

" *clienfum*

" cliensium desideras, quas, Italico bello, incenso tabulario, interisse scimus omnes. Est ridiculum, ad eas quæ habemus, nihil dicere; querere quæ habere non possumus."

If a man could, in no instance, prove his freedom, but by showing a stamped admission in the corporation books, it would be in a candidate's power, after having gained the good wishes of the town-clerk, to engage him not to enter the admissions of those who were not likely to befriend him, and at the moderate risk of ten pounds he could insure him against any consequences of his refusal so to do in any particular instance.—Where the numbers run near, a very few ten pounds would secure a majority.

But from the titles, and the whole tenour of the stamp acts, it is obvious that they were meant but as revenue laws, and not intended to affect or stop the ordinary course of legal evidence. This is so much the case, that if you pay the penalty, and [164] produce a certificate thereof, the entry of admission itself may be given in evidence although not stamped, as appears from the case of the King against Reeks, reported by Lord Raymond (1).

By the statute of 17 Geo. II. cap. 3. § 1. it is enacted, " That the churchwardens and overseers

(1) 2 Lord Raym. p. 1446, line 9, from the bottom of the page.

" shall cause publick notice to be given in the
 " church, of every rate for relief of the poor, allow-
 " ed by the justices, the next Sunday after such
 " allowance; and no rate shall be reputed sufficient
 " to be collected, till after such notice given." Yet
 it has been determined that a person paying under
 a rate, which never was so published, shall never-
 theless gain a settlement (1) The principles of that
 determination will, by analogy, apply to the pre-
 sent case, since it shews that, where particular so-
 lemnities are enacted for particular purposes, as,
 with regard to stamps, for that of securing the pay-
 ment of a branch of the revenue, and, with regard [165]
 to the publication of rates, for that of general no-
 toriety, although the legislature may have enforced
 the performance of such solemnities, by depriving
 the person or persons neglecting them of the use
 which might otherwise have been made of the
 thing on which they ought to have been employed,
 yet the want of those solemnities is not to annihi-
 late titles or rights acquired, and capable of proof,
 independent of them, On the whole, all the ope-
 ration of the stamp laws is, that, if an instrument
 or entry of admission is not stamped (or at least the
 penalties not paid) shall not be of any advantage to
 the person offending against them, in establishing
 his right of freedom. This was sufficient, and the
 legislature does not go farther, and say, that such

(1) *Quare.*

person shall not be suffered to prove his right by any other evidence.

[166] If, notwithstanding what has been said, it were still to be thought, both that persons claiming a right to vote as being sons of freemen born after their fathers were made free, must *themselves* have been made free, and that the only legal evidence that they *have*, is their admission enrolled upon stamps, still, on the clearest principles of law, the persons rejected at the last election were entitled to vote. When they demanded to be enrolled they offered to shew that, when they were born, their *fathers* were free, and that they died in the exercise of all the rights of freemen. Surely, after such a length of time, *their* being freemen was not to be contested. The law would *presume*, with regard to them, enrollment upon stamps, if essential, and every other necessary form. The court of King's Bench never would suffer the right to a franchise to be questioned, upon the suggestion of so stale a defect of title. In the case of the King against Stevens, that court unanimously refused to grant an information, because the person against whom it had been moved for had been in possession for twenty-nine years (1); and, since that case happened, they have laid down a rule, never to grant an information [167] in the nature of *Quo warranto* against a corporator *de facto*, if he has been twenty years in the undisturbed enjoyment of his franchise (2). If, there-

(1) 1 Burr. p. 433. Michaelmas 31 Geo. II.

(1) *Vide supra*, Case of Helleston, p. 6, 7.

fore,

fore the title *to be admitted* of those who claimed by birth, was not to be questioned, if they could shew that at the time of their birth their fathers were in possession of the franchises of freemen, and so continued till their death, if they were ready to prove this, but were not permitted, and if, upon this legal ground, they demanded to be admitted and enrolled upon stamps, and were refused, they are to be considered as if they had been in fact admitted and enrolled, as to the right of voting either at corporation elections, if, by the constitution of the borough, they have any share in them, or for members of Parliament; and having tendered their votes at the last election, they are entitled to be put upon the poll. This equitable doctrine has been recognized and established, with regard to the election of mayors, in the cases of the *King v. Osborn*, and *Austin v. Osborn*, Trin. 2. George the First (1), and, with regard to the election of members of Parliament, in numberless instances to be found in the Journals, but particularly in the case of Shrewsbury, which was determined a few days ago (2). [168]

The palpable collusion in the sham *mandamus*, nominally brought by Snee, but conducted by the agent for his pretended antagonists, is the strongest proof that they and their advisers knew that the law was against them.

(1) Comyn's Rep. 240. 243.

(2) *Vide supra*, vol. i. p. 470, 471.

As to 137 of the rejected voters, it has been proved, by the testimony of Griggs, and by the polls, that they have been in the possession and exercise of the franchise of voting as freemen ever since May, 1754 (1), which is more than twenty years previous to the last election. Their right therefore could not have been questioned at the time of the election even in Westminster-hall, since the rule which has been just mentioned had attached upon them, and this Committee will not suffer rights to be disputed before them, which cannot be attacked in the ordinary course of law. The votes of those 137 persons must therefore, at all events, be added to the poll, and they alone, independent of the others, are sufficient to give both Sir Walden Hanmer and Sir Patrick Blake a great majority over the sitting members.

[169]

III^d Point.] The most unjustifiable behaviour of the mayor, in garbling the statute of George the Third, and in deceiving the electors, in order to persuade them not to tender their votes, while it proves that if he knew that, if tendered, they ought to be received, convicts him of such intentional and criminal partiality, as calls for a degree of censure and punishment sufficient, by the example, to deter others in the like situation from practices of so dangerous a tendency (A).

The counsel for the sitting members contended,

(1) *Supra*, p. 142.

That,

That, as to the admission of *honorary* freemen, the magistrates being allowed to have a right of selling, must likewise have a right to give away the freedom of the town and common, the one necessarily comprehending the other.

That, as to the inference that persons were free- [170]
men, and entitled to vote, from their names appearing on the communage-books as having received the communage-money, it was so far from fair or conclusive, that widows, who as women cannot exercise any of the rights of freedom, appear on those books. That, on the contrary, the communage-money was to be considered as a sort of charity, of the nature of alms, and that, as such, by the common law of Parliament, the receipt of it had disqualified those who did receive it, even supposing their votes otherwise to have been good.

But they chiefly relied on their construction of the stamp-laws, by which they contended that nothing but stamped admissions could be legal evidence of a person's being a freeman.

In reply, the Counsel for the petitioner said, on the question concerning the honorary freemen,

That, though it may be true that where a man can sell a thing *as his own*, he may confer it gratis, yet this will not apply to the select part of a corporation, who, in admitting to the rights of com- [171]
mon, and of carrying on trades in a borough, act only as trustees for the corporate body at large. That their power of disposing of those rights for a

consideration in money, which counterbalance ~~s~~ those already possessed of them what they lose ~~b~~ their being communicated to a greater number, ~~r~~ is far from involving in it a power of diminishing the value of those rights to the subsisting freemen, by an encrease of number without any equivalent or compensation.

That, as to the distribution of the communage-money, it had been proved, that, by the custom of the borough, it is given only to freemen, and freemen's widows. That all the men, therefore, who appear by the books to have received it, must be considered as freemen, and that without going into the litigated question of the common law disqualification by alms, the communage-money can never be considered as alms; that it is the property of the persons to whom it is paid, purchased by themselves, or their forefathers who first acquired the freedom of the borough; and that it is given as an equivalent to those, who, not having cattle of their own to turn on, cannot enjoy the privilege of the common in that way.

[172]

During the course of the cause, the counsel for the petitioners proposed to call a witness, to prove a conversation of one Delande, an alderman of Sudbury; on a suggestion that Delande himself could not be found to be served with the Speaker's warrant.

This was objected to, and the point being argued,

The Committee, after clearing the court,

Resolved,

Resolved, " That the counsel should not be
 " permitted to go into this evidence."

After the Committee had settled their opinion among themselves with regard to the merits of the election, before they communicated their determination to the House, they ordered Strut, the mayor, and all the agents and persons belonging to Sudbury who happened to attend, to be called in, and the Chairman, by their direction, publicly reprimanded Strut for his conduct at the election. He told him, That, by publishing a partial, mutilated extract from the statute of George the Third, he had converted what was designed by the legislature for the most equitable purposes, to serve the worst: That the object of that statute was to secure men, possessed of an established right to vote, in the substantial and effectual exercise of that right, by preventing their suffrages from being overpowered by an influx of new voters, unconnected with the borough, and made such merely to serve a particular job: But that he had falsely held out its penalties to persons who had an established right, in order to deter them from exercising it. That the Committee had it in their power to report his conduct, and expose it to the justice of the House (A), but they hoped a sense of their lenity, and his own guilt, would be sufficient, in future, to prevent him from acting such a part, if ever he found himself in a situation, similar to that in which he appeared at the last election. [173]

The numbers on the returning-officer's poll stood as follows :

For Fonnereau,	-	-	-	-	-	181
For Crespigny,	-	-	-	-	-	179
For Hanmer	-	-	-	-	-	74
For Blake	-	-	-	-	-	73

94 of the voters for the sitting members were objected to as honorary freemen. If the petitioners had only succeeded on that point, the majority would have still been against them ; for Fonnereau would have remained with 87 votes, and Crespigny with 85. If, therefore the Committee had thought, that admissions upon stamps, in the corporation books, were necessary to establish the right of voting to *all* those who had been rejected, they could not decide in favour of the two petitioning candidates.

[175]

Of the 388 who were rejected, 26 were proved to have polled at every former election ever since 1734 (1). If we add those to the votes for Hanmer and Blake, deducting at the same time the honorary freemen from those for the two sitting members, the majority will then be in favour of the two former, the numbers standing thus: for Hanmer 100; for Blake 99; for Fonnereau 87; for Crespigny 85. It was, therefore, *possible* that the decision should be in favour of Hanmer and Blake, the Committee holding the honorary freemen's votes to be void, and of the 388 rejected, only the 26 above-mentioned to be good. But every argument

(1) *Supra*, p. 142.

and

N O T E S

ON THE CASE OF

S U D B U R Y.

PAGE 169, 173. (A.) The following case was very much in point to the conduct of the returning officer. In 1705, on occasion of an election, the mayor of Norwich had published a bye-law, made at an assembly held in Norwich, 28 Oct. 1640, enacting, That any one that should give his voice for any man, not free, to be chosen citizen for the Parliament, should forfeit to the use of the poor, five pounds, or suffer imprisonment (1). The House, on this, (6 Dec. 1705,) Resolved, "That William Blyth, Esq. late mayor of the city of Norwich, by *printing and publishing* a pretended bye-law, made in the year 1640, contrary to *Magna Charta*, in order to terrify the electors of the said city from free and impartial voting in the late election of members to serve in Parliament for the said city, is guilty of an illegal and arbitrary proceeding." And ordered, "That the said William Blyth be, for his said offence, taken into the custody of the Serjeant at Arms attending this House (2)."

(1) Journ. vol. xv. p. 55. col. 3. p. 56. col. 1.

(2) Journ. vol. xv. p. 56. col. 1, 2.

1

XVII.

T H E

C A S E

Of the DISTRICT of

**WIGTOWN, WHITEHORN, NEW
GALLOWAY, and STRANRAER,**

In SCOTLAND,

The COMMITTEE was chosen on Tuesday, the 21st March, and consisted of the following Gentlemen

Sir Tho. Clavering, Bart. Chairman.	} Members for	Durh. cou
John Tempest, Esq. - - - -		Durham.
Christopher Griffith, Esq. - - -		Berkshire.
John Dyke Acland, Esq. - - -		Callington
Hon. Thomas Lyon, - - -		Aberdeen,
Charles Ogilvy, Esq. - - - -		West-Loe
William Weddel, Esq. - - - -		Malton.
Sir Cecil Wray, Bart. - - - -		East-Retf
Hon. Charles Finch - - - -		Castle-Rit
Joseph Martin, Esq. - - - -		Tewkesbu
Hon. John Vaughan, - - - -		Berwick.
Earl of Fife, - - - -		Bamf-hire
Lord Adam Gordon, - - - -		Kincardin
N O M I N E E S		
<i>Of the Petitioners :</i>		
John Burgoyne, Esq. - - - -	} Members for	Preston,
<i>Of the Sitting Member :</i>		
Solicitor General of Scotland - -		Edinburgh

P E T I T I O N E R :
Henry Watkin Dashwood, Esq.

Sitting Member :
William Norton, Esq.

C O U N S E L
For the Petitioner :
Mr. Macdonald, Mr. Elliot.

For the Sitting Member :
Mr. Crosby, Mr. Lee (A).

THE
C A S E

Of the DISTRICT of

W I G T O W N, &c.

WHEN the Committee met on Wednesday, the 22d of March, Mr. Dashwood's petition was read, which, as it contains the general state of his case, and will serve as a precedent for petitions from districts of boroughs in Scotland, it may be proper to insert at length.

“ TO the Honourable the Commons of Great
“ Britain, in Parliament assembled, The Peti-
“ tion of Henry Watkin Dashwood, Esq.
“ humbly sheweth,

“ That your petitioner, and William Norton,
“ Esq. were candidates at the last election of a
“ member to serve in Parliament for the district of [182]
“ the boroughs of Wigtown, Whitehorn, New
“ Galloway, and Stranraer, in Scotland, which
“ election

" election was had on Monday, the 31st day of
 " October, 1774; That, at the said election,
 " the delegates for the boroughs of Wigtown,
 " Whitehorn, and Stranraer, duly chosen, and ap-
 " pointed for those three boroughs, met at Gallo-
 " way, the presiding borough, and that Alexander
 " Ferguson, Esq. chosen and appointed delegate
 " for the borough of New Galloway, *absented him-*
 " self from the said election, having pretended
 " resign the office of delegate; That John Newall,
 " Esq. pretending to have been duly chosen del-
 " gate for the said borough of New Galloway,
 " upon such pretended resignation of the said
 " Alexander Ferguson, Esq. was admitted to vote,
 " and accordingly voted for the said William
 " Norton, Esq. But your petitioner, having had
 " the votes of the delegates of the boroughs of
 " Wigtown and Whitehorn, at the election afore-
 " said, and the said William Norton the vote of
 " the legal delegate of the borough of Stranraer
 " only, (the pretended delegate, John Newall,
 " Esq. not having any legal authority to vote at
 " such election) had, thereby, a majority of legal
 " votes; notwithstanding which the said William
 " Norton has been returned as the burghers duly
 " elected, to serve in Parliament for the aforesaid
 " district of boroughs, to the manifest injury of
 " your petitioner. Your petitioner, therefore,
 " humbly prays this honourable House to take the
 " premises into their consideration, and grant him
 " such

“such relief, as to this honourable House shall
“seem meet (1).”

There were two questions in this case.

1. Whether Mr. Newall was duly chosen a delegate, for the borough of New Galloway, and was capable of voting at the election of the member to serve in Parliament for the district.—The supposed illegality of the appointment, and of the vote of Newall, was the only ground of Mr. Dashwood’s claim to the seat.

2. Whether a person, not a burgher of any one [184]
of the boroughs composing a district, is capable of being elected a burgher to serve in Parliament, for that district.—Mr. Dashwood was not a burgher of any one of the four boroughs for which he was a candidate, at the time of the election; and this objection to his eligibility was taken, on the trial of the cause, by the counsel for the sitting member.

To render the arguments in this case more intelligible, it will be proper to premise a brief account of the mode of electing the members for the boroughs in Scotland, as it has been established by several acts of Parliament, since the union of the two kingdoms.

By an act of the Scotch Parliament, of the 5th February, 1707, cap. 8. (2) declared to be equally

(1) Votes, Dec. 6. p. 32, 33. Acts, small edit. vol. iii. p.

(2) Ruffhead’s Statutes, vol. 736, &c.

iv. p. 232, 233, 234. Scots

valid as if it had been inserted in the treaty of union, there are* to be, of the forty-five representatives of Scotland, in the House of Commons (to which number they are confined by the 22d article of that treaty) fifteen chosen by the royal boroughs. Of these, one is chosen by the city of Edinburgh, and one by each of fourteen districts, into which, by that act, the remaining boroughs are divided (B). Each borough of a district receives a precept from the sheriff or steward, in whose jurisdiction it lies within four days after he receives the writ of election, by which precept the magistrates are commanded to elect a commissioner (or delegate) according to the manner in which they formerly elected the members they sent to the Scotch Parliament.

[186] The delegate, when elected, has a regular commission given him, and all the delegates meet on the day appointed for choosing the member of Parliament, at one of the boroughs in the district. That day must always be the thirtieth after the teste of the writ, unless that happen to be a Sunday, in which case the election must be on the thirty-first day after the teste of the writ (1).

The borough where the election is made is called the presiding borough. This each borough is, in its turn, from one general election to the next, in the order prescribed by the Scotch act before-mentioned (B). If a vacancy happen in the inter-

(1) 6 Anne, cap. 6. § 5.

val between two general elections, the borough which presided at the general election immediately preceding (1), or (as it is expressed in the statute, and which amounts to the same thing) the borough which presided at the election of the member whose seat has become vacant, is to preside at the election consequent upon such vacancy.

The whole power of election is devolved upon the delegates, so that they may vote for whom they please, and are neither bound to receive, nor follow, any instructions from their respective constituents (C).

In the event of an equality of voices, the delegate of the presiding borough has a casting vote, [187] besides his vote as commissioner for his own borough (2).

If the commissioner from the presiding borough be *absent* from the meeting for the election of the burgesses to serve in Parliament, or refuse to vote, the commissioner from the borough which was the presiding borough at the last election, and if he also be absent, or refuse to vote, the commissioner from the borough, which was the presiding borough, at the election immediately preceding the last; and in case he be absent, or refuse to vote, the commissioner from the borough, which was the last presiding borough but two, has, besides his own vote, the casting or decisive vote (3).

(1) 5 Anne, cap. 6. § 5. (2) 5 Geo. Stat. 1704 cap. 8.

(3) 16 Geo. II. cap. 11. § 28.

The time for the election of the delegates is prescribed by the statute of the 7th of George the Second, cap. 16, § 5. That section, which is very material in the present case, is in the following words:

[188] “ Be it enacted, that the several sheriffs and
 “ stewards in Scotland shall within the space of
 “ four days after the writ shall come to their hand,
 “ issue their precepts to the several boroughs with *in*
 “ their jurisdiction to elect their delegates, and
 “ shall cause the same to be delivered to the chief
 “ magistrate of such borough resident in the borough
 “ for the time being: and that such chief magi-
 “ strate, to whom such precept shall be delivered,
 “ shall *within two days* after his receipt of the same,
 “ call and summon the council of the borough to-
 “ gether, by giving notice personally, or leaving
 “ notice at the dwelling-place of every counsellor
 “ then resident in such borough, which council
 “ shall then appoint *a peremptory day for the election*
 “ *of the delegate; but two free days shall intervene*
 “ *betwixt the meeting of the council which appoints*
 “ *the day of election of the delegate, and the day on*
 “ *which the election of the delegate is to be made.*”

The facts of the case, as they were taken from the entries in the corporation-books of New Galloway, and admitted by the counsel on both sides, were as follows.

[189] In consequence of the precept of the steward-substitute of the stewartry of Kircudbright (within whose jurisdiction the borough of New Galloway is
 situated

situated (B), which precept was delivered to the proper officer in the borough, on the 15th of October, the council was summoned, and met on the 17th, agreeable to the provision of the statute; and they appointed the 22d as the *peremptory day* for the choice of their delegate. On that day (the 22d) they chose Mr. Ferguson. His commission was regularly made out, and he accepted it.

The day for electing the member of Parliament was the 31st of October, being the thirtieth day after the teste of the writ.

On the morning of that day, a letter from Mr. Ferguson was presented to the council of the borough of New Galloway, then assembled, dated at Edinburgh, which is at the distance of about eighty miles, purporting; that it was impossible for him to attend the election, and declaring, therefore, that he thereby resigned his commission, and desiring them to choose another delegate in his place. His commission, which accompanied the letter, was also produced. The council unanimously resolved to accept of the resignation, and to proceed to a new election of a delegate; which they accordingly did, and John Newall, Esquire, was unanimously chosen (as Ferguson had been), and by the same persons who had elected Ferguson; they being all present, at both elections. A commission was made out in form to Newall, and accepted.

[190]

C A S E XVII.

At the election of the member of Parliament appeared, and, producing his commission, acted presiding officer, and gave his voice for Mr. Norton. The delegate for the borough of Stranm voted also for Norton. The other two gave the suffrages for Dashwood; so that there was equality of voices. Upon this, Newall gave casting vote for Norton, and the town-clerk New Galloway, who was by law the returning officer (1), made a return of Norton as the person duly elected.

As to the second question;

It was admitted that Mr. Dashwood was not a burgess of any of the four boroughs at the time of the election. The counsel for the sitting member stated, that he (the sitting member) was a burgess (not honorary) of one of the boroughs at the time of the election; and the counsel on the other side said they were not instructed to the contrary.

COUNSEL for the Petitioner.

1st Point.] The election, commission, and return of Mr. Newall were all void.

The precept for the election of a member for the borough of New Galloway, having been completely obeyed, by the choice of Mr. F. Newall, became, thereby, *functum officio*, and the

(1) 16 Geo. II. cap. 11. § 30.

which the magistrates derived under it, having been exercised for such first choice, was entirely at an end.

A delegate being a mere creature of the acts of Parliament, his election must be, in every respect, agreeable to the provisions of those acts, otherwise he cannot exist as such. [192]

The great object of the statute of the 7th of George the Second, was to prevent a surprize on the different members of the town-council who had a right to vote at the election of their delegate, by giving them sufficient notice, and time, to attend. Hence it enacted, that two *free* days should intervene, between the meeting for naming the day of the election, and the day of such election; that is, two entire days, exclusive of those on which the respective meetings of the council are holden. Here there was no previous notice of the pretended election of Newall. However fair the proceeding may have been in this particular instance, the precedent, if it were to receive a sanction from the decision of the Committee, would open the door to manifest fraud upon future occasions; since, by taking care to propose for the first delegate a man agreeable to the majority of the council, but whose intention to resign was predetermined, the chief magistrate on the morning of the election of the member, would have an opportunity of proceeding, without any warning, and with a packed number of counsellors, to choose a new delegate. [193]

C A S E ' X V I I .

delegate, contrary to the sense and inclinations of the majority of the electors.

Ferguson, notwithstanding his pretended letter of resignation, continued still to be the legal delegate for the borough. This office is like that of a member of Parliament, who has a duty and service imposed upon him by his constituents, and cannot resign. The letter, therefore, which was sent by Ferguson to the borough, can only be considered as a refusal to be present, or to vote at the election of the member for the district, which brings the case exactly within the provision of the statute of the 16th of the late King (1).

C O U N S E L for the Sitting Member.

[194] The statutes relied on, by the counsel on the other side, are merely *directory*, and not mandatory (D) and therefore acts, substantially right, are not necessarily void, because in doing those acts the particular modes of proceeding chalked out by the statutes, are not followed in every circumstance.

By the ancient statute law of England, and by the writ to the sheriff, the election of members to serve in Parliament for that part of the kingdom is directed to be made by persons present at the proclamation of the writ; but this is seldom complied with, and in the late case of Bristol (2) it was determined that it is not necessary.

(1) 16 Geo. II. cap. ii. § 23. Vide *supra*, p. 137.

(2) *Supra*, vol. 1.

By

By a statute of the 7th and 8th of William the Third, it is enacted, That upon the election of any knight of the shire, the sheriff shall hold his county-court for that purpose, at the most public and usual place of election, and where the same has most usually been for forty years last past (1). Yet, on the occasion of a controverted election of a knight of the shire for the county of Pembroke, although the usual place of election had been Haverfordwest, and the sheriff had, in that instance, proclaimed it at Pembroke, and held it there, that deviation from the directions of the statute, was not thought to be fatal to the election. *Quære*. (E) (2). [195]

If Ferguson had died, or an act of attainder had passed against him, in the interval between his election and that of the member of Parliament, was the borough, on that account, to forfeit its share in the choice of a representative? This would be contrary to the known and just rule of law, that none shall ever be deprived of their franchises by the act of God, or the fault of another.

This Committee, being a court of supreme ultimate jurisdiction, without appeal, like all courts of the same kind, cannot do substantial justice unless it be considered as a court of equity, as well as

(1) 7 and 8 Will. III. esp. p. 461. col. 2. 10 Jan. 1770.
25. § 3. and same vol. p. 905. col. 2.

(2) See Journ. vol. xxxii.

of law. In the former capacity it ought to follow the sense and spirit of the statutes rather than the strict words, and should make it a rule to decide *secundum equum et bonum*.

That in cases of elections for boroughs in Scotland, where a situation arises not foreseen, or, at least, not provided for, by the legislature, the parties may proceed, according to their discretion, in the manner most consistent with reason and justice, is proved by a remarkable case which happened a few years ago. Jedburgh, at a time when it chanced to be the presiding borough of its district, was, in consequence of a sentence of reduction by the court of session, under a disability of choosing magistrates of course, it could have no delegate at the election of the member to represent the district in Parliament. It came, therefore, to be a question, which of the remaining boroughs should have the presidency. Haddington had presided last; Dunbar was next in rotation after Jedburgh: the order of the five being Haddington, Jedburgh, Dunbar, North Berwick, Lauder. This case was not [197] provided for by the statute of the 16th of the late King (1). Mr. Warrender had the votes of Dunbar and North Berwick, Mr. Ogilvy (one of the members of the present Committee) those of Haddington and the other remaining borough of the district. There being an equality of voices, which ever of the two contending boroughs had a

(1) Cap. xi. sect. 28.

right to the precedence, and the casting vote must turn the election. The delegate for Dunbar claiming that right, (and insisting that the district was to be considered as consisting only of four boroughs in the following rotation, Dunbar, Lauder, North Berwick, Haddington, Dunbar, Lauder, &c.) voted a second time for Warrender, and he was returned. The other candidate, for whom the delegate for Haddington had given a second vote, petitioned; contending that the case was within the 28th section of the statute abovementioned, and that the casting vote ought to revert to the last presiding borough. But the petition coming to be referred to a Committee (the second that sat after the new judicature was established), that Committee determined, 19 April, 1771, That Warrender was duly elected (1) (F).

[198]

In the present case, there was (at first) an election in strict conformity to the statute;—the statute was therefore obeyed: but afterwards, an event having happened not provided for, the corporation exercised their discretion, and all those who, on the former occasion, had voted unanimously for Ferguson, having also been unanimous in electing Newall, he was to all intents and purposes, the delegate of the same persons; his act was as much theirs as Ferguson's would have been, and, as they do not, no one else has a right to complain.

(1) Journ. vol. xxxiii. p. 265. col. 2.

If

If the appointment and vote of Newall should still be thought to have been illegal, yet, as the law was so uncertain, that Mr. Ferguson, an advocate of character, and many other gentlemen of great reputation at the Scotch bar, thought that [199] the resignation of the one, and the subsequent election of the other were valid, the utmost effect of the illegality of the choice of Newall could only be a void election.

II^d Point.] But even that cannot be the case, if, by the known and established law, Mr. Dalhousie was not eligible; for then the suffrages given in his favour must be considered as thrown away, and, supposing Newall incapable of voting, still, the only remaining delegate having also voted for Norton, he must be determined to be duly elected.

Now it is well known to every lawyer in Scotland, that, to be capable of representing a district of boroughs, the candidate must be a burgher of some of those boroughs (G). The writ particularly commands the sheriff to cause to be elected commissioners for the election of a burgher (1) for each district; and the sheriff, in his precept (2), following the words of the writ, commands the magistrates, and town-council, of each borough, to elect [200] a commissioner, in order to elect a burgher for the district to which it belongs.

(1) Wright's Law of Elections for Scotland, Appendix, p. 383.

(2) *Ibid.*

By certain acts of the convention of boroughs referred to by Sir George Mackenzie, and by an unprinted statute of the third Parliament of Charles the Second cited likewise by that author, it was ordained, that only actual trading merchants should represent the boroughs in Scotland, and, though that act is not perhaps in force, yet it shews the sense of the legislature at that time, and confirms the established rule, that the representatives of boroughs must at least be burgeses of some of those boroughs.

Not only the writ and precept, but all the statutes on the subject since the union, denominate the members for boroughs *burgesses* (1).

Some qualification or other is necessary for all members of Parliament. In order to represent a county in England, a man must be possessed of six hundred pounds a year in land, and of three hundred in order to represent a borough (2). In like manner, to be chosen a commissioner for a shire in Scotland, a man must have such an estate in the county as entitles him to be an elector (3). By analogy, therefore, we must conclude that, to be capable of being elected for a district of boroughs, some qualification is requisite, and that qualification is the being a burges in one of the boroughs of the district.

[201]

(1) 16 Geo. II. cap. 11, &c. *See, Case of Clackmannan*

(2) 9 Ann, cap. 5. § 1. *shire.*

(3) Wight, p. 267. *vide in-*

COUNSEL for the Petitioner, in reply.

Ist Point.) The statute of the 7th of George the Second is clear, explicit, and certainly cannot be dispensed with. If it be true, that a Committee for trying controverted elections is to be considered as a court of equity, as well as of law, yet a power of dispensing with acts of Parliament does not come within the proper *English* sense of equity. This power the Chancellor has as little pretensions to as the courts of King's Bench and Common Pleas. Indeed, even according to the popular notion of equity, the Committee could not be justified in depriving the petitioner of a right which has fairly accrued to him by a positive act of the legislature. It has already been said, that the chief view of the Parliament, in laying down rules for the election of delegates, appears evidently to have been, to give all persons concerned sufficient time to think of a proper person, and to attend at the election. That is the meaning of leaving two free days between the day of appointing, and the day appointed for, the election. If a case has arisen where that was impossible, we must interpret the law as if it had said, "Better *that* particular borough should want a delegate, than have one chosen without this previous warning to those concerned." It is no answer to say, "In this case there was no surprise. All those present at Ferguson's election, were also present at that of Newall, and were, in both instances, unanimous." Be it so; still the precedent is dangerous, and against law.

When

When the law has assigned a particular day for any election, it is necessary, in almost all cases, that such election should be made on that particular day; otherwise it is void.

In English boroughs, till not many years ago, if the corporation slipped the charter-day for the choice of their annual magistrates, they never afterwards could be elected; and, although the immediate consequence was, (or at least the necessary subsequent consequence must be), a dissolution of the corporation, yet the law suffered that consequence, rather than permit the election to be made on another day. This part of the law was big with monstrous inconvenience, infinitely greater than what is suggested in the present case; yet no court, either of law or equity, ever thought that they could dispense with it, on any occasion the fairest or most favourable; and it continued, till the legislature interposed, and altered it in the 11th year of George the First (1). [204]

The case of Jedburgh bears no resemblance to the present. There one of the boroughs was (*pro tempore*) extinct, and the district was, as the sitting member alledged, reduced to the number of four. It was therefore, perhaps, agreeable to the statutes that it should proceed as if it had always been a district composed of that number. However, the principles, on which that case was decided, were so far from being understood to be clear, that the

(1) 11 Geo. I. cap. 4. *vide supra*, Case of Helleston, p. 41.

Lord Advocate of Scotland thought an act of Parliament necessary to provide for similar cases which might afterwards occur; and, accordingly, by a statute of the 14th of the present King, it was enacted, That, in such cases, the right of presidency should go on to the borough next in rotation (1), agreeable to the decision of the Committee in 1771. If there had been no doubt concerning the law of that decision, such a statute would not have been requisite (H).

[205]

Ild Point.] All the arguments which have been brought to show, that a member for a district of boroughs in Scotland must be a burges of one of those boroughs, prove too much. The unprinted statute of Charles the Second, and the laws of the convention of boroughs, referred to by Sir George Mackenzie, require the member to be an actual trading merchant; and, if the word "*burgess*" in the writ, and in the precept, means a corporator, it must mean one who is effectually so, and not a mere *honorary* burges, who is in truth no member of the corporation, nor, in any legal respect, a burges. It is well known that such honorary burgeses, in Scotland, have no corporate rights, and can join in no corporate act. They cannot be chosen into the magistracy of the borough; nor can they vote at a poll-election, at which all the real burgeses are entitled to vote (I). In short, the creation of them is a vain compliment, (of

(1) Cap. 81. § 2.

which the boroughs are known to be very liberal to all classes of * people,) and to all intents and purposes a mere nullity.

Now it is a fact, which will not be denied, that, at least ever since the union, there is scarce an instance of a member for Scotch boroughs being any thing more than an honorary burgher. Will it be seriously maintained, that all the representatives of those boroughs, in the British Parliament, have been illegally chosen, and that they had no right to their seats?

In England, by the positive statute law, it was ordained, That the citizens and burgesses of the cities and boroughs, should be "chosen men, "*citizens, and burgesses, resident, dwelling, and free,* "in the same cities and boroughs, and no other, in any wise (1)." Yet the gradual operation of time (K), had so far repealed that statute, that, for centuries, it was never adhered to, and before the statute of last year (2), which directly repealed it, the non compliance with it would never have been allowed as an objection to the member for an English city or borough. [261]

In Scotland, no positive existing law has been shown, requiring the qualification contended for by the counsel for the sitting member; and, if there were such a law in the Scotch statute-book, it is there subject to the operation of what, in the legal language of that country, is called *Desuetude*,

(1) 1 Hen. V. c. 1.

(2) 14 Geo. III. c. 58.

and,

and, by not being enforced for so long a course of years, has repealed itself.

It is said, That the writ and precept command that *burgesses* shall be elected. So does the English writ. Indeed, the meaning of the words "*burgess*" and "*citizen*," applied to members of parliament, seems to be quite different from their signification, when used for members of corporate bodies. In the first case, they are only employed in contradistinction to "*knights of the shire*," and they no more mean corporators, than the word "*knights*" in that part of the writ which respects county elections, means persons of any particular order of knighthood.

[208] This is clearly demonstrated by the case of the members for the two Universities. In the sheriff's writ, in the precept, and in the return, *they* are denominated *burgesses* of the University, although, as *corporate* members of the University, no such persons as *burgesses* can exist (L).

It is said, that, as certain qualifications are required by law in all other members of the House of Commons, we cannot suppose that no qualification is requisite in order to represent a district of Scotch boroughs. But, in the first place, all the qualifications which have been stated by the counsel on the other side are created by statute, and were unknown to the common law, and, in the second place, the fact alledged is not true, for no qualification whatever is necessary in the representatives of the two English Universities (1).

(1) *Vide* Vol. i. p. 284.

WIGTOWN, &c.

If a qualification, at all like what is contended for, was necessary by the ancient law of Scotland, it must have been, that the representative of each borough should be a burgher of that individual borough. This, from the nature of the representation since the union, cannot now be necessary. If it were, as the member for a district represents every borough in that district, no man could be chosen for such district, without being a burgher of every one of the four or five boroughs, of which it is composed. What would be the consequence? Any one of the boroughs, by refusing to bestow the freedom of their town on a candidate, might put a negative on the election of a person in whose favour all the others would have united; by which means the right of the majority to choose their representative would be, in effect, overturned.

The Scotch act of 1707, provides, That none shall be capable of being elected (1), but such as were capable of being so before the union; but that provision must be so construed as to be consistent with the new mode of representation, which the qualification contended for, if taken in its full extent, is not. In this very case, the fitting member has but a fourth of that qualification.

That the act of 1707 is to be so construed, is proved by the case of Edinburgh 13 March, 1711,

(1) Ruffhead's Statutes, vol. iv. p. 233.

C A S E X V I I .

which, as to the principle, is exactly in point to the present argument. The case was shortly this.

On the petition of Henry Hamilton, Esquire, complaining of an undue election, and return of Sir Patrick Johnston, for the city of Edinburgh, "being incapable of sitting in *this* Parliament," "regard he is a *merchant* and served for the said city in the last Parliament," it was shown, by the petitioner's counsel, that by a decret arbitral, confirmed by King James the Sixth of Scotland, umpire (*anno* 1583) and ratified in Parliament, that two members to serve in Parliament for that city were always to be, one a merchant, and the other a craftsman; and that such was the constitution of Edinburgh, which had always been followed to the union. From this they inferred, that, in respect the merchants and tradesmen of the said city were, before the union, distinctly represented, they ought still to be so, by electing a merchant and tradesman by turns. The counsel for the sitting member admitted, that the constitution of Edinburgh, before the union, had been as alledged, but insisted, "That by the act of union, the constitutions of the royal boroughs, as to their election to Parliament are altered; *and other burghs to elect a commissioner in the manner then in and they are to elect by turns (M)*: but I burgh is excepted; and the election there, is to be but of one member only, is left free the voters at liberty to choose whom they please

[211]

Upon the whole matter, the Committee and the whole House resolved, "That the fitting member was duly elected (1)."

On Thursday the 23d of March, the Committee, [212] By their chairman, informed the House, that they had determined;

That Henry Watkin Dashwood, Esquire, the petitioner, was duly elected, and ought to have been returned (2).

(1) Journ. vol. xvii. p. 136. col. 2. (2) Votes, p. 417, 418,

NOTES

ON THE CASE OF

W I G T O W N, &c.

Note
(A.)

PAGE 180. (A.) When gentlemen of the Scotch and English bar appear as counsel in the same cause, and on the same side, the rule is, that their precedence is determined by their standing at their respective bars. By this rule, Mr. Lee, who, (as a barrister) is Mr. Crosby's senior, ought to have been the leading counsel in this cause; but by Mr. Lee's desire, Mr. Crosby opened the cause for their client.

Note
(B.)

P. 185, 186. (B.) The order of the districts of the royal boroughs of Scotland, and of the different boroughs in each district, which, by the Scotch statute of 1707, was settled according to *that* in which they used to be called in the rolls of the Parliament of Scotland, is as follows :

(It is observable, that in the statute itself they are not enumerated in their proper order, but according to their local situation, the most northerly being placed first.

Edinburgh, -	Edinburgh.
strict.	
1. Tain, -	Rofs.
Dingwall, .	Rofs.
Dornoch, -	Caithness.
Wick, -	Caithness.
Kirkwall, -	Orkney and Zetland
2. Inverness, -	Inverness.
Nairn, -	Nairn.
Forres -	Elgin.
Fortrose -	Elgin.
3. Elgin -	Elgin.
Banff, -	Banff.
Cullen, -	Banff.
Kintore. -	Aberdeen.
Inverury, -	Aberdeen.
4. Aberdeen, -	Aberdeen.
Montrose, -	Forfar.
Brechin, -	Forfar.
Aberbrothick -	Forfar.
Inverbervie, -	Kincardine.
5. Perth, -	Perth.
Dundee, -	Forfar.
St. Andrew's, -	Fife.
Coupar, -	Fife.
Forfar, -	Forfar.
6. Anstruther Easter, -	Fife.
Pittenweem, -	Fife.
Crail, -	Fife.
Anstruther Wester, -	Fife.
Kilrenny -	Fife.
7. Dyfart, -	Fife.
Kirkcaldie, -	Fife.
Bruntisland, -	Fife.

Within the jurisdiction of the sheriff or steward of

Note (B.)	District.		
	Kinghorn	-	Fife.
	8. Stirling,	-	Stirling.
	Inverkeithing,	-	Fife.
	Dumfermline,	-	Fife.
	Culroß,	-	Perth.
	Queensferry,	-	Linlithgow.
	9. Glasgow,	-	Lanerk.
	Dunbarton,	-	Dunbarton.
	Renfrew,	-	Renfrew.
	Rutherglen	-	Lanerk.
	10. Haddington	-	Haddington.
	Jedburgh,	-	Roxburgh.
	Dunbar,	-	Haddington.
	North Berwick	-	Haddington.
	Lauder,	-	Berwick.
	11. Linlithgow	-	Linlithgow.
	Selkirk,	-	Selkirk.
	Lanerk,	-	Lanerk.
	Peebles,	-	Peebles.
	12. Dumfries	-	Dumfries.
	Kirkcudbright,	-	Kirkcudbright.
	Annan,	-	Dumfries.
	Lockmaben	-	Dumfries.
	Sanguhar,	-	Kirkcudbright.
	13. Wigtown,	-	Wigtown.
	Whitehorn,	-	Wigtown.
	New Galloway,	-	Kirkcudbright.
	Stranraer,	-	Wigtown.
[216]	14. Ayr,	-	Ayr.
	Irvine,	-	Ayr.
	Rothsay,	-	Bute.
	Inverary,	-	Argyle.
	Campbeltown,	-	Argyle.

See Wight, p. 376.

Within the jurisdiction of the Sheriff or Steward of

186. (C.) Although the delegates for boroughs in Scotland, are not in the nature of proxies, or attorneys, but rather to be considered as the men whom their respective boroughs judge best qualified to choose a member fit to represent the district, and, in such choice, are entirely independent of their constituents, yet it is said, that the first instance, since the union, of a delegate voting contrary to the sense and wishes of his borough, happened at the last general election.

Note
(C.)

193. (D.) See the case of New Radnor, Note (D.) *ibid.*, vol. i. p. 342, where it will be found that Sir Edward Coke made this distinction between *directory* statutes, those which are *mandatory*, or (as he, perhaps more properly, termed them) *conclusory*,

Note
(D.)

195. (E.) [This case of *Pembrokeshire* in 1776, was not exactly stated in the former edition. It was as follows : a petition of *Hugh Owen*, Esq. the election (which had been held at *Haverfordwest*) was, on the ground of the partiality of the sheriff, declared to be void. On this a new election took place, which was held at *Pembroke*, although *Haverfordwest* was the most usual place, &c. Mr. *Owen* being now returned, some of the freeholders in the opposite interest petitioned, on the ground that the election had been held at a wrong place, contrary to the statute. But the ordinary sheriff's court having been appointed at *Pembroke*, previous to the receipt of the writ by the sheriff, and the writ having been received more than six days before the day when the court was fixed to be held, it was contended, that those circumstances the sheriff was bound, by another provision of the same statute, to hold the election at that court, and therefore could not comply with the other requisition of the statute, and the sitting member (Mr. *Owen*) was declared duly elected].

Note
(E.)

Note
(F.)

P. 198. (F.) The entries in the Journals respecting this case, are as follows:

[218]

“ 19 March, 1771, a Petition of Charles Ogilvie, was presented and read, setting forth, That at the last election of a member to serve in Parliament for the boroughs of Jedburgh, Dunbar, North Berwick, Lauder, and Haddington, one of the districts of boroughs entitled to send members to Parliament, the petitioner, and lieutenant colonel Patrick Warrender, stood candidates, and that, by the rotation established by law, Jedburgh was the presiding borough, and its commissioner, or delegate, the præses of the meeting, and, in absence of the delegate from Jedburgh, the delegate from Haddington had the right of presiding, and that the borough of Jedburgh had no delegate at the said election, and the delegate from Haddington accordingly presided, and gave his casting vote in favour of the petitioner, the number of voices being before equal; but the sheriff of the county of Haddington, within which county the boroughs of Dunbar, North Berwick, and Haddington lie, having issued his precepts to those boroughs commanding their delegates to go to Dunbar, as the presiding borough, and place of election, a return was thereby procured in favour of the said Patrick Warrender, in wrong of the petitioner, who was then, and there, duly elected, and ought to have been returned the burghes accordingly, and that the return of the said Patrick Warrender is injurious to the petitioner, and in manifest violation of the laws requiring fair and just elections; and therefore praying,” &c. Vol. xxxiii. p. 265. col. 2.

“ 19 April, 1771, Mr. Montagu informed the House, that the select Committee, to whom the petition of Charles Ogilvie, Esq; complaining of an undue election and return for the boroughs of Jedburgh, Dunbar, North Berwick, Lauder,

Lauder, and Haddington, was referred, have tried the merits of the said petition, and have determined,
 “ That Patrick Warrender, Esq. is duly elected a commissioner to serve in this present Parliament for the said district of boroughs.” Same vol. p. 338. col. 2. See also Wight, from page 363, to page 368.

Note
 (F.)

P. 199. (G.) Mr. Wight, in his late publication on the law concerning Scotch elections, lays this down as a qualification absolutely necessary. “ No other qualification (says he) “ is necessary to entitle one, who is not disabled “ by certain statutes (which he refers to) to represent a “ district of boroughs, but *that he be admitted a burgher of “ one or other of the boroughs of which that district is composed.*” p. 373. But he cites no authority whatever in support of that position, and I do not find that there is any authority for it in the statute book of Scotland.

Note
 (G.)

[219]

P. 205. (H.) The 14th of George III. cap. 81. is clearly in the style of an *enabling* not a *declaratory* statute. Although in Westminster-hall, the general rule is, that where a point has been directly determined by the court of ultimate jurisdiction, their determination is to be considered as the law on that point, yet that rule is not universal. In the famous case of *Reeve against Long*, in the reign of King William, the court of Common Pleas, and, on a writ of error, the court of King’s Bench held, that the son of a tenant for life, who was next in remainder after the father, and who was a posthumous child, and therefore born after the particular estate determined, could not take the estate, but that it must go over to the next in remainder. The House of Lords reversed the concurrent judgments of both the inferior courts, but against the opinion of all the judges. A few years afterwards, the statute of the 10th and 11th William the Third, cap. 16. *enacted*, that, in cases of such limitations

Note
 (H.)

Note
(H.)

limitations by any marriage, or other settlement, the posthumous child shall take. By this *enacting* statute, the legislature indirectly said, that the judgment* of the House of Lords in Reeve and Long was not law. *Nota.* Though, from the history of the case, and statute, there is little reason to doubt, but that, by the general expression, "*other settlements*," were meant *wills* as well as *deeds*, (for the question in Reeve and Long arose upon a will), yet it is extraordinary that, in an act of Parliament which was made in order to prevent the inconvenience arising from a nice legal subtlety, the legislature should have used words so inaccurate as to leave a possibility of questioning whether they really extended to the evil meant to be remedied. *Vide* 1 Salk. p. 228.

Note
(L.)

P. 205. (L.) For the form of a warrant for a poll-election, see the Appendix to Wight, p. 389. *Honorary* burghesses are expressly excluded from voting by that warrant. Formerly it would seem that the election of magistrates in the royal boroughs in Scotland was popular. The statute of 1469, cap. 29. reciting, "That there was great contention yearly for the chusing of the same, throw multitude and clamour of commounes, simple persones," enacted, that the old council should choose the new. However, when a borough is *reduced*, the King still exercises the prerogative of issuing a warrant for reviving it by a popular election, called a poll-election. I have not been able to find on what law this power in the Crown is founded. Mr. Wight, where he is expressly treating of poll warrants, does not mention it, (Wight, p. 344.), nor Macdowall, (vol. ii. p. 581). When, by reason of disturbances in the country, or some other cause, the legal day for the election has been slipped, so that there can be no magistrates and council chosen in the usual manner, the King sometimes directs by his warrant, that only the magistrates, or the magistrates and

council

[221]

Council of the former year, shall make the election. (Wight, *ibid*).

Note
(I.)

P. 206. (K.) According to the rules of the English law, no statute can be abrogated by disuse, and the only constitutional method of reconciling the fact as to this and some other old statutes with the law, is to adopt the distinction of Sir Edward Coke, between statutes *directory* and *conclusory*. *Vide supra*, p. 216. note (D.)

Note
(K.)

P. 208. (L.) For the writ to the sheriff of Oxford, *Vide supra*, vol. i. p. 448. Case of Abingdon, Note (A.) The words of the return to the precept directed to the University of Oxford, are, "— Witnesseeth, that the aforesaid Chancellor, Masters, and Scholars, of the aforesaid University, "freely and indifferently have chosen two of the most discreet and sufficient men of the aforesaid university to be "their burgessees of the Parliament of the said Lord the King," &c.

Note
(L.)

P. 211. (M.) These are the words of the Journals. They mean that the election was to be holden at each of the different boroughs in a district by turns.



XVIII.

THE

C A S E

Of the BOROUGH and COUNTY of the

T O W N o f P O O L E.

The Committee was chosen on Friday, the 24th of May
and consisted of the following Gentlemen :

Lord Charles Spencer, Chairman
John Elwes, Esq. - - - -
Charles Turner, Esq. - - - -
John Tempest, Esq. - - - -
Thomas Knight, Esq. - - - -
George Grenville, Esq. - - - -
Sir William Guise, Bart. - - - -
Charles Wolfeley, Esq. - - - -
Sir John Eden, Bart. - - - -
Sir Adam Ferguson, Bart. - - - -
Hon. Lucius Ferdinand Cary, - - - -
Thomas Powys, Esq. - - - -
Thomas Edwards Freeman, Esq. - - - -

Oxfordshire.
Berkshire.
York.
Durham.
Kent.
Buckingham.
Gloucester.
Milton.
Dorset.
Ayrshire.
Bridport.
North.
Stey.

Members for

NOMINEES,

Of the Petitioners :

William Adam, Esq. - - - -

Of the Sitting Members :

Viscount Lisborne, - - - -

PETITIONERS.

Hon Charles James Fox, and John Will:
Inhabitants and Householders, (and al
bearing lot,) within the Borough a
Town of Poole.

Sitting Members :

Sir Eyre Coote, K. B. John

COUNSEL,

For the Petitioners

Mr. Alleyne, Mr.

For the Sitting Members

Mr. Wilson, J

THE

THE

C A S E

Of the BOROUGH and COUNTY of the

TOWN of POOLE.

ON Saturday, the 25th of March, the Committee being met, the two petitions were read, by which it appeared, that the only question in the cause was,

Whether the right of the election is "In the burgesſes of the borough excluſively;" or

"In the inhabitants and householders within the borough, paying ſcot and bearing lot (1)."

The ſheriff had rejected thoſe who tendered their votes as inhabitants, householders, and only admitted the votes of burgesſes (2). [226]

(1) In the petitions the words "paying ſcot and bearing lot" were inſerted, but in parentheſis. Mr. Fox and Mr. Williams had polled a ſufficient number to give them a majority, whether the payment of ſcot and lot ſhould be thought an eſſential qualification to perſons voting as inhabitants, householders, or not.

(2) Votes 6 Dec, p. 33, 34.

It

It was admitted, by the counsel on both sides, that a great majority of the latter were in favour of the sitting members; and

That, if the former have a right to vote, there was a great majority for Mr. Fox and Mr. Williams.

After the petitions had been read, the Chairman, according to the usual form, directed the clerk to read the last determination in the House of the right of election.

The counsel for the petitioners denied that there is in the Journals any resolution of the House, touching the right of election in this borough, which can be considered as a determination, within the meaning of the statute.

[227] The counsel for the sitting members insisted, that such a determination is to be found in the entry in the Journals of the proceedings with regard to this borough, of the 9th of February 168².

This preliminary question was argued by all the counsel.

The entry referred to is as follows.

A petition of Thomas Chaffin, Esquire, complaining that Sir Nathaniel Napper had been returned, in prejudice to the petitioner, having been referred to the Committee of privileges and elections, their chairman reported to the House,

“ That the matter in question was, Whether
 “ the right of election be in *the mayor and burgesses*
 “ *only*; or in the mayor, burgesses, and *commonalty*,
 “ *who pay scot and lot* :

“ That

“ That it appeared to the Committee, by many
 “ parliament returns, which were produced to the
 “ Committee, that the right of election had
 “ anciently been in the mayor and burgesſes only ;
 “ except a return in the 18th year of King James
 “ the Firſt; wherein the *commonalty* are mentioned,
 “ with the mayor, aldermen, and burgesſes, in the
 “ indenture ; but that indenture is ſealed with the [228]
 “ *common ſeal* of the mayor, aldermen, and bur-
 “ gesſes.

“ That Sir Nath. Napper had thirty-three bur-
 “ gesſes, and Mr. Chaffin but twenty-two.

“ But, of the *commonalty*, that Mr. Chaffin was
 “ allowed to have had the greater number.

“ And that, thereupon, the Committee had
 “ agreed on two reſolves.

“ 1. That it is the opinion of the Committee,
 “ that the right of election of burgesſes to ſerve in
 “ this preſent convention, for the town and county
 “ of Poole, is in the mayor, burgeſs[es], and
 “ commonalty, of the ſaid town and county, who
 “ pay ſcot and lot.

“ 2. That it is the opinion of this Committee,
 “ that Thomas Chaffin, Eſquire, is duly elected a
 “ burgeſs to ſerve in this preſent Convention, for
 “ the town and county of Poole.

“ A debate ariſing in the Houſe thereupon ;

“ The queſtion being put, That this Houſe do
 “ agree with the Committee, that the right of [229]
 “ election of burgesſes to ſerve in this preſent
 “ Convention, for the town and county of Poole,

“ is in the mayor, burgesſes, and commonalty
 “ of the ſaid town and county, who pay ſcot and
 “ lot;

“ It paſſed in the *negative*.

“ The queſtion being put, That the Houſe do
 “ agree with the Committee, That Thomas Chaffin
 “ Eſquire, is duly elected to ſerve in this preſent
 “ Convention, for the town and county of Poole;

“ It paſſed in the *negative*.

“ Reſolved, That Sir Nath. Napper, Baronet,
 “ is duly elected a burgeſſes to ſerve in this pre-
 “ ſent Convention for the town and county of
 “ Poole (1).”

COUNSEL for the Petitioners.

[230] This diſagreement of the Houſe from the Com-
 mittee can never be conſidered as a determination
 within the meaning of the ſtatute of George the
 Second, becauſe, the conſequence of ſuch a deter-
 mination being to ſhut the door againſt all future
 enquiry, and to conclude all perſons concerned,
 with regard to one of the moſt valuable rights
 known in the conſtitution of this country, it ought
 to be *poſitive* and *explicit*.

All that can be inferred from the diſagreement
 of the Houſe is, that they did not think that the
 concluſion drawn by the Committee was warranted
 by the evidence which they appeared, by their
 report, to have had before them, and, therefore,
 did not adopt that concluſion.

(1) Journ. vol. x. p. 24. col. 2.

If the House had meant to declare the right of election in Poole, upon that occasion, they would have done it, as in other similar cases, by a *direct* resolution.

Where the House puts a negative on any proposition, it would be strange indeed, if we must infer that by such negative the converse of that proposition is necessarily established.

There is no other instance where a disagreement of the House, from a resolution of the Committee of privileges and elections, has been considered as a last determination. [231]

It was argued, on the other side;

That this was certainly a determination or judgment of the House, upon the right of election; for that Sir Nathaniel Napper could not have been adjudged to be duly elected, but upon the foundation of the right being in the mayor and burgesses, exclusive of the other claimants.

That it is not necessary that the determination, in order to bring it within the meaning of the statute, should be in the technical form of a *resolution*. If that had been the intention of the legislature, the word "*resolution*," would have been used in the statute (1).

The counsel being directed to withdraw, the Committee deliberated for about two hours, when

(1) *Vide Supra*, Case of Pontefract, vol. i. p. 393. 400, 401.

they were called in again, and informed, by the Chairman, that the Committee had

*Resolved, That they should proceed to give evidence of the right of election. †

The counsel for the petitioners endeavoured to prove the right to be as stated in the petitions, from general principles of law, and from the history; constitution, and ancient usage of the borough.

The substance of their arguments and evidence was as follows:

The general rule of law is, that in boroughs where there is no original charter, and no *prescriptive* usage limiting the right of election, it is in the inhabitants householders. This rule is recognized in a variety of cases in Glanville's book, particularly those of Cirencester, p. 107, and Pontefract, p. 142, and in Whitelock's Commentary, vol. i. p. 500 (1). In the case of Cirencester (or Cicester), the entry in the Journals is in these words, "Resolved, That where no custom, nor

<p>[† So, in the Committee on an election for this borough, which met 31 January 1782, after argument at the bar, the question being put, "That the said resolutions of the House of Commons of the 9th of Feb. 1688-9, are such a determination as by the act of 2 Geo. II. c. 24. must</p>	<p>"be final," it passed in the negative; and in a subsequent Committee, which met 11 Feb. 1791, the question was again argued, and the Committee decided, by a direct resolution, "That the proceedings in 1688-9 do not amount to a last resolution, within the meaning of the statute."]</p>
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(1) *Supra*, Case of Pontefract, vol. i. p. 403.

"charter

‘ charter for election, there the inhabitants, house-
‘ holders, ought to make the election (1).”

*That the ancient proper sense of the word “*bur-
“ genses,”* or “*burgeffes,”* is “*the inhabitants of a*
“ *borough,*” is proved by the following authorities.
Spelman’s Glossary, Title “*Burgenses.*” White-
lock’s Commentary, vol. i. p. 500. vol. ii. p. 95.
(2) Madox’s Firma Burgi, p. 2. No. 111;† and
that the House has so understood the word both in
ancient charters, and in returns, appears from the
case of Abingdon, 23 May, 1660 (3), and that of
Aldborough in Yorkshire, 17 May, 1690 (4).

From an inspection of all the ancient charters,
granted to the corporation of Poole, it will be evi-
dent, that, down to one of the 10th year of the
reign of Queen Elizabeth, “*burgenses,*” in those
charters, means “*inhabitants.*”

It will also appear, from inspecting the ancient
returns to Parliament from this borough, until that
period, that they all run in the name of the mayor [234]
and *burgenses.*

And the necessary conclusion must be, that the
returns of members of Parliament, and the elections,

(1) Journ. vol. i. p. 792.
col. 1.

(2) *Vide* Case of Pontefract,
vol. i. p. 405.

[† *Vide* also, Lord Holt’s opi-
nion, in the Case of *Abby v.*
White. 2 Ld. Raym. p. 946.]

(3) Journ. vol. viii. p. 42.
col. 1, 2.

(4) Journ. vol. x. p. 418,
col. 1, 2. See those two cases
cited in the case of Pontefract,
supra, vol. i. p. 405, 406, 407.

were made by the mayor and *inhabitants* down to the 10th of Elizabeth.

(↪ All the ancient records cited in this case, were given in evidence, and I transcribed the passages taken from them, from copies and translations, collated and admitted by the parties.)

EVIDENCE.

‘ Poole is a borough by prescription.

‘ The first charter to be found has no date, but
 ‘ is supposed to have been granted some time be-
 ‘ tween 1 and 9 Ric. I. very near the beginning of
 ‘ legal memory, about the year 1190. By this char-
 ‘ ter, William Longespee, (or Longsword), lord of
 ‘ the manor of Great Canford and Poole, grants and
 ‘ confirms to his *burgesses* of Poole and their heirs
 ‘ (*inter alia*), That his said *burgesses* should have
 [235] ‘ well and peaceably their yearly *liberty of herbage*
 ‘ in his heath, as they had always been accustomed
 ‘ to enjoy, and necessities *for their firing* in his heath
 ‘ or common, by the view of his bailiffs. By the
 ‘ same charter, a particular form of government
 ‘ was chalked out for the borough. The said bur-
 ‘ gesses, out of their own number, were to choose
 ‘ *six burgesses*; out of which six, he (the lord), was
 ‘ to appoint one to be head ruler, [*propositus*], and
 ‘ who was to be amovable at his, or their pleasures,
 ‘ if he should neglect his duty. The charter states,
 ‘ that, for the above grant and confirmation, the
 ‘ said burgesses had given three score and ten marks,
 ‘ or about 56 l. sterling.’

COUNSEL for the Petitioners.

From this charter it appears, that the word “*burgesses*” is applied to the body at large, as an existing body before the grant : they were therefore *prescriptive burgesses*, i. e. *the inhabitants*. The six *burgesses* were to be chosen, as it would seem, merely as six persons out of whom the lord might name one to be a *propositus*, and did not form a select body for any other purpose.

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Under this grant, confirmed by all the subsequent charters, the *inhabitants* of Poole have always enjoyed, and to this day continue to enjoy, a right of common.

EVIDENCE.

‘ To prove the right of common in the inhabitants, John Hadden, Esq; was called.

‘ It appeared that he is possessed of an estate for 99 years in the manor of Canford, and that he is an *inhabitant* of Poole ; the tenants of the manor of Canford have an *unlimited* right of common.

‘ His evidence was objected to by the counsel for the sitting members.

‘ It was said, that he was an interested witness; That if he could establish the right of common in the inhabitants of Poole, he himself would have a double and more valuable right; for that although the right of the tenants of the manor of Cunford might be *unlimited*, yet that does not entitle them to put on any indefinite number of cattle ; for that, even when you have what is fre-

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‘ quently called common *sans nombre*, you can on-
 ‘ put on as many cattle as are sufficient to sto-
 ‘ and manure your lands (*Quere*) (1).

‘ The Committee, after the point had be-
 ‘ argued, Resolved, Not to admit the evidence.

‘ James Edwards was called for the same pur-
 ‘ pose. He is steward to Sir John Webb, lord of
 ‘ the manor of Canford. The amount of his evi-
 ‘ dence was this :

[238] ‘ The *inhabitants* of Poole *claim* a right of com-
 ‘ mon, and take herbage and turf. He never heard
 ‘ any thing to the contrary. Never heard that
 ‘ their right had been contested by former lords.
 ‘ Has known the manor fifteen years. Has been
 ‘ house-steward to Sir John Webb fifteen years ;
 ‘ but land-steward only one year and three months.
 ‘ The lord *only drives* the common. He, (the wit-
 ‘ nefs) never assisted but at one drift. On that
 ‘ occasion, after the common was driven, several
 ‘ *inhabitants* of Poole came and claimed their cattle.
 ‘ He has seen turf cut and carried into Poole.
 ‘ There are some tenants of Canford manor who
 ‘ live in Poole, Not many. He does not know
 ‘ whether it was for them that the turf was cut.
 ‘ Nor whether those inhabitants of Poole who came
 ‘ to claim their cattle, were tenants of Canford
 ‘ manor, * He cannot name any of them ; and can-
 ‘ not tell whether they were more in number,
 ‘ than those tenants of the manor who reside in
 ‘ Poole.

(1) *Vide* 3 Blackst. p. 238, 239. 4to.

‘ The next charter, bearing date 10 June, 45
 ‘ Edw. III. (1371), is granted by William de Mon-
 ‘ tacute, Earl of Salisbury, and lord of the manor
 ‘ of Canford. It contains an *inspeximus*, recital,
 ‘ and confirmation of the charter of Longespee;
 ‘ and grants that the *propositus* should be, from
 ‘ thenceforth, called mayor. The grant to the
 ‘ burgeses to dig turf, and to cut heath and furze;
 ‘ is renewed in more exprefs and explicit terms.

‘ By the third charter, dated 8 Feb. 12 Hen. IV. [239]
 ‘ (1411.) Thomas de Montacute, Earl of Salisbury,
 ‘ lord of the manor of Canford, recites and con-
 ‘ firms the two preceding ones, to the aforefaid
 ‘ *burgesses* and their heirs.

‘ The fourth is a royal grant of Henry VI. in the
 ‘ eleventh year of his reign, (1433) founded, as it
 ‘ would seem, on an act of Parliament to the same
 ‘ effect, (*Rot. Parl. in Turr. Lond.* 11 Henry VI.
 ‘ n. 38.) to the mayor and *burgesses*, that Poole
 ‘ shall be a free port; and giving to the said mayor
 ‘ and *burgesses* licence to wall, intrench, and fortify
 ‘ the said town and port of Poole, and parts ad-
 ‘ jacent; the said mayor and *burgesses* having made
 ‘ an offer to that effect.’

COUNSEL for the Petitioners.

It cannot be supposed, that, in this last men-
 tioned charter, the word “*burgenses*” is confined to
 the six particularized in that of Longespee, or that
 the mayor and six persons only undertook so ex-
 pensive

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penfive a work as the proposed fortification must have been.

EVIDENCE.

‘ By the fifth, dated 1 July, 31 of the same King (1454), he grants to the mayor, bailiffs, *burgesses and inhabitants*, a weekly market, and two annual fairs. This too was by the authority of Parliament.

‘ The sixth, dated 20 Jan. 1 Edw. IV. (1460) contains an *inspeximus*, recital, and confirmation of the fourth, to the mayor and *burgesses*, and their successors; and proceeds on the supposition of Henry VI. having been only King *de facto*.

‘ The seventh, dated 20 June, 3 Hen. VIII. contains an *inspeximus* and recital of the fifth and sixth, and a confirmation of them to the *mayor and burgesses* of the town of Poole, and their successors.

COUNSEL for the Petitioners.

[241] Here the grant of the market and two fairs to the *mayor, burgesses, and inhabitants*, is confirmed to the *mayor and burgesses*, which demonstrates the promiscuous use and meaning of the words “*burgesses*” and “*inhabitants*.”

EVIDENCE.

‘ The eighth, dated 12 Hen. VIII. (1521) was not read, as being immaterial.

‘ By the ninth, dated 4 Sept. 18 Hen. VIII.
(1527)

' (1527) Arthur Plantagenet, viscount Lesley,
' vice admiral of England, reciting, that the de-
' puty admiral of England, and his commissary ge-
' neral, had inspected all the royal grants, and pri-
' vileges, and the former grants of old, and the
' grant of William de Montacute to the *mayor*,
' *brethren, bailiffs, burgeses, and inhabitants*, and
' also the late confirmation by Hen. VIII. by which
' they are fully excepted from all kind of jurisdic-
' tion and power of the admiral of England; de-
' clares, that the said privileges are most clearly
' demonstrated to belong to the said *mayor, bre-*
' *thren, bailiffs, burgeses, and inhabitants*; and ratifies
' and confirms the same.'

COUNSEL for the Petitioners.

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Here, it is evident, that the former grants to the
mayor and burgeses, particularly the grant of the
privileges of a free port, were understood to vest
those privileges in the *inhabitants*; or, in other
words, that the term "*burgesses*" included *in-*
habitants. And this is declared upon a solemn ex-
amination of the former grants, by the officers of
the lord high admiral, whose interest it was to deny
them those privileges, being an infringement of
the general jurisdiction of the admiralty.

E V I D E N C E.

The tenth was not read.

(It bears date 18 Feb. 1 Eliz. (1559) ' and
' contains an *inspeximus*, recital, and confirmation
' of

‘ of the former charters, granted by the lords of the
 ‘ manor of Canford.)

- [243] ‘ The eleventh is in English, and contains the
 ‘ arms of the town of Poole, emblazoned by Cla-
 ‘ rencieux, king of arms, who declares, “ Theis be
 ‘ the armes appertaininge and belonginge *to the*
 ‘ *maire, baillyes, burgesyes and inhabitants* of the
 ‘ towne of Poole, and to all the corporacion of the
 ‘ same, which *inhabitants* of the said towne of Poole,
 ‘ as appeared by anncynt charters to me, in my
 ‘ visitacion shewed, were *incorporated* by William
 ‘ Longespee Erle of Sarum by the name of Porte
 ‘ ryve (1) baylyfe, and burgesyes of his town of
 ‘ Poole, parfell of his manor of Canford, which
 ‘ corporacion was ratyfyed, ammplifyed and con-
 ‘ firmed by William Monteacute Erle of Sarum,
 ‘ by the name of his mayre, baylyfe and burgesyes
 ‘ of his said town and burrough of Poole, which
 ‘ towne and borrough of Poole is now in the inheri-
 ‘ tance of James Blunte knyghte, Lord Mountjoye,
 ‘ as in the right of his said manor of Canford. The
 ‘ whiche arms above set forthe, I Clarencieux
 ‘ Kynge of Armes have ratified and confirmed un-
 ‘ to the mayre, baylyfs, burgesyes and *inhabitants*
 [244] ‘ of the said towne and burough of Poole in this
 ‘ my present visitacion within the countye of
 ‘ Dorsete.”

COUNSEL for the Petitioners.

There is no date to the last mentioned instru-

(1) Probably his translation of *Propositus*.

ment,

ment, but it must have been before the 10th year of Queen Elizabeth, because, in that year, Poole was erected into a county (1).

. Perhaps it may be said that, notwithstanding the promiscuous use of the words "*burgesses*" and "*inhabitants*" in the foregoing charters, inhabitants are incapable of incorporation, or of taking as a corporate body. But such an opinion is not founded on any sound principle of law, nor supported by any decision in Westminster-hall; and there are other instances besides Poole, where inhabitants, as such, are made corporators. In Hobart's Reports, p. 14. and in Coke's, part 12. f. 121. it appears that, by the charter of the borough of Dungannon in Ireland, "The inhabitants of the said borough were made a corporation."

EVIDENCE.

[245]

. ' The returns to Parliament, for the borough of Poole, before the 10th of Elizabeth, which are preserved in the Roll's chapel, are as follows :

. 1. One of 36 Edw. III. The electors are not mentioned in this, it being only the general return of the sheriff for the whole county (2).

. ' 2 Sept. 12 Edw. IV. " It is witnessed that *the burgesses* of the same borough have unanimously elected, &c."

(1) *Vide infra*, Charter of don, Note (C) *supra*, vol. i. p. 10 Eliz. 450.

(2) See the Case of Abing-

' From

‘ From this return, none can be found till the first year of Queen Mary.

‘ 3. 23 Sept. 1 Mar. “ Between Sir John
‘ Rogers knight, sheriff of the county of Dorset,
‘ of the one partie, and John Davy mayor &c. Wil-
‘ liam Grein the byliffe’s depute, J. M., J. N.,
‘ M. R., R. R., and T. G. burgesfes of the said
‘ towne, Wytnessethe, that the mayor, byliffe’s
[246] ‘ depute, and *burgesses* of the said towne have elect-
‘ ed,” &c.—Attested under *their* common seal.

‘ 4. 1 Nov. 1 & 2 Phil. & Mar. “ Between
‘ Sir John Tregonnel knight, sheriff of the county
‘ of Dorset, of the one partie, and William New-
‘ man, mayor, Richard Goddard bailieff; J. M.,
‘ M. R., Th. B., J. C., J. S., *burgesses* of the said
‘ towne of Poole of the other partie, witnesfethe,
‘ that we, the said mayor, bailief, and *burgesses* of
‘ the said town have elected, &c. In witnes where-
‘ of, &c.—the said mayor bailief and *burgesses* have
‘ put the common seal of the said town.”

‘ 5. 1 Eliz. “ By indenture between Sir John
‘ Horsey knight, sheriff of Dorset, of the one part,
‘ and W. G. mayor of Poole, W. B., baily, J. M.,
‘ J. A., (then several words obliterated) J. D.,
‘ W. N., J. B., J. C. and W. (then several words
‘ obliterated) said town of Poole, witnesfithe that
‘ the mayor, baily and *burgesses* o’, &c. have elected,
‘ &c.—In witnes, &c. the said mayor, baily, and
‘ (then several words obliterated) have put to
‘ their common seal, of the said town of Poole.’

COUN-

COUNSEL for the Petitioners.

The above are all the returns which the petitioners have been able to find of a date anterior to the 10th of Queen Elizabeth.

There are no corporation-books of the town of Poole extant prior to that year.

The result of what has been hitherto said, and of the evidence produced, is ; That the common law right of election for boroughs is in all the inhabitants householders. That there is no prescription and no charter prior to the 10th of Queen Elizabeth, contrary to this common law right, in the town of Poole. That "*burgenses*" (or "*burgesses*") is a term used in ancient writings and instruments for the *inhabitants* of a borough. That it means so in the charters of this borough till the 10th of Elizabeth. That all grants to the *burgesses* of Poole have, in fact, passed the thing granted to the *inhabitants*. That the arms, and, consequently, the common seal, belong to the *inhabitants*, and therefore, that every instrument, sealed with the common seal, is the instrument and act of the *inhabitants*. That the returns to Parliament, from the earliest times, till the 10th of Elizabeth, being sealed with the common seal, and testifying that the elections were made by the mayor, bailiff and *burgesses*, prove that, till that time, the right of election, which, by the common law, was in the *inhabitants* householders, was, in fact, enjoyed and exercised by them.

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If

If it could be shown, that, from that time to this, the *inhabitants* had never exercised, or claimed the right of voting for members of Parliament; if the uniform practice, ever since, had been, that elections were made by the mayor, bailiffs, and a certain restricted number of inhabitants called *burgesses*; if bye-laws, or even royal charters, could be produced, confining the right to them;—no relinquishment, no usage, no bye-law, no charter, nothing but an act of Parliament, or a clear determination of the House (which, coupled with the statute of George the Second, would have the force of an act of Parliament) could have power to deprive them of that right. This is (1) supported by the authority of Lord Coke, and fully established by the case of Agmondesham, Marlow, Wendover, and Hertford, Glanville, p. 87. of Dover, p. 66. of Chippenham, p. 53. and of Winchelsea, p. 17; and in the Journals, by the cases of Colchester (2), 28 March, 1628, and Boston, 8 May, 1628 (3) (A).

But, with regard to Poole, it will appear from the subsequent view of the charters, the records of the borough, and the returns to Parliament, with the proceedings on contested elections, from the 10th of Queen Elizabeth downwards, that there is not, from that time to this day, any charter which

(1) 4 Inst. p. 48.

(2) Journ. vol. i. p. 876. col. 2.

(3) Journ. same vol. p. 893. col. 2.

has attempted to narrow the right of election, nor even any bye-law of the borough, no act of Parliament, no determination within the meaning of the statute, (for, if the Committee had thought the entry of 168^s was such a determination, they [250] would not have suffered the evidence, which has been given, to be produced) and no relinquishment, or contrary usage for more than eighty years.

(The Chairman here interrupted the counsel, to inform them that the Committee did not mean that they should be understood to have decided that the proceedings in 168^s *do* or *do not* contain a determination of the House within the meaning of the statute.)

E V I D E N C E.

‘ The 12th charter of the borough was granted
‘ to Eliz. (23 June, 1568), and is to the following
‘ effect :

‘ It recites the charter of 3 Hen. VIII. and
‘ those therein recited, and ratifies and confirms
‘ the immunities granted by them to the mayor,
‘ bailiffs, burgeses, and *inhabitants*, as the said
‘ mayor, bailiffs, burgeses, and *inhabitants*, from
‘ the time of making the said charters, were accus-
‘ tomed to hold and enjoy them.

‘ It recites, that the mayor, bailiffs, burgeses, [251]
‘ and *inhabitants*, time out of mind, had enjoyed
‘ the said privileges, &c. and others, as well by
‘ *prescription* as by reason of the aforesaid grants,

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‘ but

‘ but that the said mayor, bailiffs, burgesſes, and
 ‘ *inhabitants* had not enjoyed them for many years
 ‘ paſt, to the great detriment of the ſaid town, by
 ‘ which it was threatened with ruin, and the good
 ‘ government of the ſame was almoſt extinct.

‘ That thereupon the *burgesses and inhabitants* of
 ‘ Poole had petitioned the Queen, that ſhe would
 ‘ make, reſtore, and create the ſaid *burgesses and*
 ‘ *inhabitants* into another body corporate and
 ‘ politic.

‘ That ſhe therefore, &c. (hoping that, if the
 ‘ *inhabitants* of the town aforeſaid, and their ſuc-
 ‘ ceſſors ſhould enjoy, by her grant, greater ho-
 ‘ nours, liberties, and privileges, they will think
 ‘ themſelves bound, &c.) grants that the ſaid town
 ‘ of Poole ſhall be for ever after a free town of
 ‘ itſelf, and be incorporated, to conſiſt of one
 ‘ mayor, two bailiffs, burgesſes, and *commonalty*,
 [252] ‘ (in the original *communitas*), and that they the
 ‘ ſaid mayor, bailiffs, burgesſes, and *commonalty*;
 ‘ be one body politic, by the name of the mayor,
 ‘ bailiffs, burgesſes, and *commonalty* of the town
 ‘ of Poole, &c.

‘ That the burgesſes of the town aforeſaid may
 ‘ elect every year (on a day fixed by the charter) a
 ‘ fit and diſcreet burgeſs to be mayor, and two
 ‘ other burgesſes of the ſaid town to be bailiffs,
 ‘ &c.

‘ That the ſaid mayor, bailiffs, burgesſes, and
 ‘ *commonalty*, and their ſucceſſors, and the inhabi-
 ‘ tants and reſidents within the ſaid town, be, in
 ‘ no

‘ no fort, liable to be bound by any precepts of
 ‘ the stewards, marshall, or clerk of the market of
 ‘ the household.

‘ She grants a staple to the said mayor, bailiffs,
 ‘ burgessees, and *commonalty*, and their heirs and
 ‘ successors; and that the said burgessees may
 ‘ choose, out of themselves, annually, a mayor and
 ‘ two constables of the staple.

‘ That the said mayor, bailiffs, burgessees, and
 ‘ *commonalty*, and their heirs and successors, may
 ‘ annually elect and constitute, (on a day fixed) [253]
 ‘ out of the *inhabitants of the town and suburbs*
 ‘ *thereof*, or out of others, all manner of brokers,
 ‘ &c.

‘ She then grants to the said mayor, bailiffs,
 ‘ burgessees, and *commonalty*, and their successors,
 ‘ that the town aforesaid, with the suburbs, places,
 ‘ and precincts aforesaid, be, for ever afterwards,
 ‘ one entire *county*, incorporated in deed and name,
 ‘ and distinct and altogether separate from the
 ‘ county of Dorset, by the name of the county of
 ‘ the town of Poole.

‘ That the said mayor, bailiffs, burgessees, and
 ‘ *commonalty* shall have, in the said town, one sheriff.
 ‘ The burgessees of the said town, and their suc-
 ‘ cessors, in every year, (on a day fixed) to elect
 ‘ one discreet person, out of their fellow-burgessees,
 ‘ (*comburgenses* in the original), for the sheriff of
 ‘ the said town.

‘ She grants to the mayor, bailiffs, burgessees,

‘ and *commonalty* a weekly court, to be held in the
 ‘ Guildhall, before the mayor and senior bailiff.

• ‘ ‘ To the mayor, bailiffs, burgesſes, and *com-*
 ‘ *monalty*, that the mayor, for the time being, and
 ‘ one ſkilled in the law, and alſo four burgesſes,
 ‘ to be choſen, annually, out of the diſcreet bur-
 ‘ geſſes, (on a day fixed) ſhall be keepers, (i. e. juſ-
 ‘ tices) of the peace.

‘ To the mayor, bailiffs, burgesſes, and *com-*
 ‘ *monalty*, view of frankpledge, &c.

‘ To the mayor, bailiffs, burgesſes, and *com-*
 ‘ *monalty*, and their ſucceſſors, that none of them,
 ‘ nor *any inhabitant*, or reſident, within the town,
 ‘ &c. ſhall be impanelled, againſt his will, on any
 ‘ aſſize, jury, or inquiſition, &c. without the town
 ‘ of Poole.

‘ That the *inhabitants, burgesſes, and commonalty*,
 ‘ of the town of Poole, may have their guild, and
 ‘ all their liberties, jurisdictions, &c. by land and
 ‘ by ſea, in the ſame manner with the mayor, bai-
 ‘ liffs, and burgesſes of the town of Southampton,
 ‘ and all other liberties, &c. which the mayor,
 ‘ bailiffs, *burgesſes and inhabitants* heretofore had, or
 ‘ uſed to have.

[255] ‘ That the ſaid mayor, bailiffs, burgesſes, and
 ‘ *commonalty*, and their ſucceſſors, and *all other*
 ‘ *inhabitants and burgesſes* of Poole, ſhall be free
 ‘ from toll, paſſage, bridgage, chimnage, &c.

‘ That the ſaid mayor, bailiffs, burgesſes, and
 ‘ *commonalty*, ſhall have the return of all writs within
 ‘ the town.

‘ That

‘ That the said mayor, bailiffs, burgesſes, and
‘ *commonalty*, ſhall create, out of themſelves, coro-
‘ ners, &c.

‘ That none of the ſaid mayor, bailiffs, burgesſes,
‘ and *commonalty*, inhabiting within the ſaid town,
‘ ſhall be impleaded without the ſaid town, except
‘ for ſuch treſpaſſes as ſhall be done againſt the
‘ Queen, or her heirs.’

COUNSEL for the Petitioners.

By this charter, the borough of Poole was erected into a county by itſelf, and its corporate name was changed; but the old royal charters were confirmed by it. The new charter was granted at the requeſt of the *inhabitants* to confirm and enlarge their privileges, and now they were formed into a ſeparate integral part, diſtinct from burgesſes, by the name of the *commonalty*, (or, in the Latin, *communitas*.)

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What has been ſaid of the ancient ſenſe of the word “*burgenſes*” or “*burgeſſes*” is true of that of the word “*commonalty*,” which may, by the particular conſtitution and corporate name of a place, ſignify a reſtricted number, but, in its more proper and common acceptation, comprehends the whole body of the inhabitants.

The caſe already cited from Hobart (1), to ſhow that *inhabitants* are capable of incorporation, ſhows, likewise, that they may be incorporated by the

(1) *Vide ſupra*, p. 244.

name of commonalty. The charter, in that case, says, "That the *inhabitants* shall be a *body corporate* by the name of provost, free burgessees, and *commonalty*." That they may vote for members of Parliament, by the name of commons, or commonalty, appears from the cases of Bridport, 12 [257] April, 1628 (1); and Warwick, 31 May, 1628 (2) (B).

That commonalty (or *communitas*) means the *inhabitants* of Poole in the charter of the 10th of Elizabeth is clear, because it was granted to, and at the request of, the inhabitants; because it confirms all former grants to the inhabitants; because the *commonalty* are, throughout, distinguished from the *burgesses*, the latter name being thenceforth confined to the select burgessees, whose origin may probably be traced to the six mentioned in the charter of Longespee, although, in course of time, their number had been gradually encreased. In those parts of the charter where the word "*inhabitants*" is used and joined with "*commonalty*," it is only employed as being more explicit, but still as descriptive of the same persons.

E V I D E N C E.

' The thirteenth charter, bearing date 24 Nov. [258] ' 19 Car. II. (1668) contains a confirmation of all ' former privileges, and a grant of new ones to the ' mayor, bailiffs, burgessees, and *commonalty*. This

(1) Journ. vol. 1. p. 882. col. 1.

(2) Journ. same vol. p. 907. col. 2.

' charter

‘ charter recites that the town of Poole had been,
 ‘ of old, incorporated, by the name of mayor,
 ‘ bailiffs, burgesſes, and *commonalty*; and that the
 ‘ burgesſes and *inhabitants* thereof, as well by that
 ‘ name as by *other names*, have uſed and enjoyed
 ‘ divers privileges, &c.

‘ 26 Car. II. An information, in the nature of
 ‘ *Quo Warranto*, iſſued againſt the corporation of
 ‘ Poole, by the name of mayor, bailiffs, burgesſes,
 ‘ and *commonalty*, and their franchises, were ſeized
 ‘ into the hands of the Crown. This *Quo Warranto*
 ‘ was produced to the Committee.

‘ 30 Sept. 30 Car. II. The burgesſes and *inha-*
 ‘ *bitants* of the town of Poole preſented an addreſs
 ‘ and ſubmiſſion to the King, praying that they
 ‘ might be reſtored to their franchises. This was
 ‘ read.

‘ The fourteenth charter, 14 Jac. II. is a charter
 ‘ of releaſe, and reſtoration. After reciting the [259]
 ‘ good ſervices of the burgesſes, and *inhabitants* of
 ‘ Poole, it releaſes to the ſaid burgesſes and *inha-*
 ‘ *bitants*, as likewise to the mayor, bailiffs, bur-
 ‘ gesſes, and *commonalty*, the judgments obtained
 ‘ againſt the ſaid mayor, bailiffs, burgesſes, and
 ‘ *commonalty*, or *againſt the inhabitants, by the name*
 ‘ *of mayor, bailiffs, burgesſes, inhabitants, and com-*
 ‘ *monalty*, or any other name or names, in Eaſter
 ‘ term, 26 Car. II. and Hilary term, 2 Jac. II.; and
 ‘ it reſtores, and grants, to the ſame burgesſes and
 ‘ *inhabitants*, as alſo to the mayor, bailiffs, burgesſes,
 ‘ and *commonalty*, all the liberties, &c. which the
 ‘ ſaid

‘ said burgesſes and *inhabitants*, or the mayor, bai-
 ‘ liffs, burgesſes, and *commonalty*, had, or by right
 ‘ ought to have had, before obtaining the ſaid
 ‘ judgment, by the name, or in the right, of the
 ‘ burgesſes or *inhabitants*, or by what names ſoever
 ‘ the *incorporate body* was called; and that the *bur-*
 ‘ *gesſes and inhabitants* of the ſaid town, for the time
 ‘ to come, might and ſhould be called one *body*
 [260] ‘ *corporate* and politick, in deed, form, and name,
 ‘ by the name of the *mayor, bailiffs, burgesſes and*
 ‘ *commonalty* of the town of Poole; as alſo, all and
 ‘ ſingular ſuch names as they lawfully had at the
 ‘ time of obtaining the judgment aforeſaid. In a
 ‘ ſubſequent part, it grants that the burgesſes and
 ‘ *inhabitants* of the ſaid town ſhould be gathered
 ‘ together in the uſual place *to make elections*, and
 ‘ do all other things requiſite and accuſtomed to
 ‘ be done.

COUNSEL for the Petitioners.

This charter demonſtrates, that the inhabitants
 were part of the ancient corporation; that “*com-*
 “*monalty*” and “*inhabitants*” were terms indifcrimi-
 nately uſed, as deſcriptive of the ſame perſons;
 and that the corporate name, of *mayor, bailiffs,*
burgesſes, and commonalty, comprehends the *inha-*
bitants.

Whatever act, therefore, imports to have been
 done by the mayor, bailiffs, burgesſes and com-
 monalty, muſt be taken to be the concurrent act

of the inhabitants, and the select part of the corporation.

It has been shown, that the arms, and consequently the common seal, belong to the inhabitants; and that every instrument or deed, to which that seal is affixed, must therefore be taken to be the act of the inhabitants (1). It remains to examine the *records* of the corporation, and the *returns* to Parliament, since the 10th of Elizabeth.

E V I D E N C E.

‘ 1st Entry.], 14 June, 10 Eliz. 1568, (and just before the charter of that year passed), It is agreed and condescended, that William Newman, now mayor of the town of Poole, with William Constantine and William Green, burgessees of the same town, being requested thereunto by the burgessees and *inhabitants* thereof, whose names are hereunder written, do sue, labour, and travel (&c. to obtain a new charter), and we, the said burgessees and merchants, do promise and bind ourselves (&c. to answer all charges). This record [262] is subscribed with about 80 names.

‘ 2d Entry.] 14 Sep. 1592. By the mayor, bailiffs, burgessees, and *commonalty*,—That the mayor, by himself, or with assistance, shall collect all the town-rents, dues, and revenues. This entry has a cross drawn through it.

‘ 3d Entry.] 26 Sep. 1592. An agreement of

(1) *Supra*, p. 247.

‘ two collectors, with the mayor, bailiffs, burgesſes,
 ‘ and *commonalty*, about collecting the revenues for
 ‘ that year.

4th Entry.] 1642. An order of the mayor,
 ‘ bailiffs, aldermen, and *commonalty*, appointing
 ‘ fix ordinary men of the *commonalty* to be watch-
 ‘ men.

‘ (↪ The diſtinction of aldermen, which occurs
 ‘ in many of the entries, does not imply any new
 ‘ integral part of the corporation. It only means
 ‘ ſuch burgesſes as have ſerved the office of mayor.
 ‘ The ſame name is given to perſons of that de-
 ‘ ſcription in ſeveral other boroughs).

[263] ‘ 5th Entry.] 13 Oct. 1654. Concerning a
 ‘ compoſition with certain individuals for a tax
 ‘ upon brewing. This entry now ſtands in the
 ‘ name of mayor, bailiffs, and burgesſes, but the
 ‘ word “ *commonalty* ” is evidently eraſed.’

COUNSEL for the Petitioners.

This aukward attempt ſhows, that it was under-
 ſtood by the ſelect part of the corporation, at the
 time when the raſure was made, that the word
 “ *commonalty*,” in the corporate name, meant ſome-
 thing different from burgesſes. The entry itſelf,
 when the word is reſtored, ſhows it, for it purports
 that the mayor, bailiffs, burgesſes, ‘ and *commonalty*,
 ‘ (i. e. the whole corporate body) order, that the
 ‘ mayor, bailiffs, and burgesſes, (i. e. a ſelect part)
 ‘ ſhall ſettle the terms of the compoſition.’

E V I D E N C E.

6th Entry.] 20 Sept. 1661. Being election-day, ordered by the mayor, aldermen, and burgesſes, that no person ſhall henceforth be made a burgeſs, without the conſent of the mayor, three aldermen, and eight other burgesſes, inhabitants of this town.

7th Entry.] 1668. At a common-hall aſſembled, 20 May, 1688, we, the mayor, aldermen, burgesſes, and *commonalty* do, by this writing, oblige ourſelves to pay, &c. to our preſent miniſter. The word "*commonalty*," in this entry, is interlined, and in blacker ink than the reſt*. [264]

8th Entry.] 1699. The mayor, bailiffs, burgesſes, and *commonalty*, nominate and appoint Samuel Bond, eſquire, to be the recorder. This appointment is ſubſcribed with the name of the mayor, and a great many other names. The power of chooſing a recorder was granted and *confirmed* by the charter of the 19th of Charles the II^d. to the mayor, bailiffs, burgesſes, and *commonalty*.

Several other entries were read, but they were either to the ſame purpoſe with the foregoing, or were not relied on, in the arguments on either ſide.

A petition was then produced by Mr. Speed, clerk of the journals and papers, which is in the

[* But it appeared, on inſpection by the Committee in 1791, to be in the ſame ink with the mayor's name, which, with ſeveral others, is ſubſcribed to this entry.]

name

CASE XVIII.

‘ name of the mayor, bailiffs, burgesſes, and *commonalty* of Poole, and bears date, and was preſented to * the Houſe of Commons in 1758. It is ſubſcribed with a great many names; and Henry Auſtin, town-clerk of Poole, being ſworn, proved that Hadden, Cobb, and Nicolſon, three of the ſubſcribers, were only *inhabitants*, and not *burgesſes*, at the time of their ſigning the petition.

‘ Then a deed of mortgage, dated in 1756, was produced, between the mayor, bailiffs, burgesſes, and *commonalty* of the one part, and one Cobb, an inhabitant of Poole, of the other part, by which the ſaid mayor, bailiffs, burgesſes, and *commonalty*, mortgaged the market to the ſaid Cobb.’

COUNSEL for the Petitioners.

In this deed, “*commonalty*” muſt mean *inhabitants*, for the concurrence of the inhabitants was abſolutely neceſſary to a mortgage of the market, ſince it was granted to *them* by the expreſs words of the charter of 3 Hen. VIII. (1).

[266]

EVIDENCE.

‘ The returns which the counſel for the petitioners produced, poſterior to 10 Eliz. were as follows:

‘ 1. 14 Apr. 14 Eliz. (1572). This return is in the name of the mayor, ſenior bailiff, and J. M., W. N., &c. (*nominatim*) and many others,

(1) *Vide ſupra*, p. 240.

‘ free

‘ *free and lawful men* of the said county, dwelling
‘ and residing electors.’

COUNSEL *for the Petitioners.*

From this return it would seem, that, after the change which had lately happened in the constitution of the place, by which it was made a county, the idea was, that the election of the members of Parliament was to be by the *freeholders*. It serves, however, to show, that there was no distinction made at this election, between *burgesses* and other inhabitants.

E V I D E N C E.

‘ 2. 28 Eliz. (1586). Between the mayor, bailiffs,
‘ *burgesses*, and *commonalty*, and the sheriff, &c.—
‘ The said mayor, bailiffs, *burgesses*, and *commonalty* [267]
‘ did choose, &c.—Under the seal of the mayor,
‘ bailiffs, *burgesses*, and *commonalty*.

‘ 3. 30 Eliz. (1588). Between the sheriff and
‘ A, mayor, B, C, &c. (*nominatim*) and others, al-
‘ dermen, *burgesses*, and *commonalty*, &c.—wit-
‘ nesseth, that the said mayor, aldermen, *burgesses*,
‘ and *commonalty*, did elect, &c.—Under the com-
‘ mon seal of the said town of Poole. This is
‘ the first return in which the word “*aldermen*”
‘ occurs.

‘ 4. 18 Jac. I. (1621). Between the sheriff and
‘ A, the mayor, B, C, D, &c. (*nominatim*) and
‘ others, aldermen, *burgesses*, and *commonalty*, &c.
‘ had elected, &c. In witness whereof, we the said
‘ mayor,

EVIDENCE.

‘ 8. 21 May, 7 Will. III. (1695). By indentures,
 ‘ between George Leven, sheriff, and Th. S., mayor,
 ‘ W. P., senior bailiff, M. D., M. D., Shadrach
 ‘ Beale, W.S., &c. and others, aldermen, burgeses,
 ‘ and *commonalty*, *incorporated*, of the said town and
 ‘ county, it is witnessed, that the said mayor, al-
 ‘ dermen, burgeses, and *commonalty*, have elected,
 ‘ &c. In witness whereof, we, the said mayor,
 [271] ‘ aldermen, and burgeses, to one of these present
 ‘ indentures, have set the common seal of the said
 ‘ town and county of Poole, &c.—Thomas Smith,
 ‘ mayor. Signed, sealed, and delivered, in the pre-
 ‘ sence of, &c. There are twenty-fix subscriptions,
 ‘ and to four of them, after the name is added “*a*
 ‘ *burges*” in the same hand and ink with the name.
 ‘ The counsel for the petitioners admitted that,
 ‘ in all returns, since the year 1695, the word
 ‘ “*commonalty*” is omitted; and that since that
 ‘ time, the *inhabitants* have never voted.’

COUNSEL for the Petitioners.

As to the proceedings on the two contested elections in 1661, and 168^a₇, nothing can be fairly inferred from the first, because the *commonalty* do not seem to have been parties to the transaction, nor to have taken any share in it (1) (C).

The event of the second, (as it has been stated

(2) 16 May, 1661. Journ. vol. viii. p. 251. col. 1.

in a former part of the argument), cannot now be considered as a binding determination. It is, at most, the opinion of the House, opposed to that of the Committee who tried the question, and had the evidence, and the arguments of counsel, to form their judgment upon. It is the opinion of the House in the *Convention* Parliament, delivered in favour of the *Whig* candidate (1). But, even if we give it the credit of being a rational and wise dissent from the resolution of the Committee, it will be considered, that that resolution was founded on the very scanty evidence of one return, whereas there has now been produced an irresistible body of proofs, which were unknown to the Committee, and the House on that occasion.

The return of 1695 demonstrates that the proceedings in 1688^s were not considered as conclusive against the right of the *commonalty*; and there is still a living witness, who remembers the election in 1695, and who, by his testimony, will confirm [273] what is proved by the return, that the *inhabitants* or *commonalty* voted at that election.

E V I D E N C E.

‘ Thomas Shepherd, the witness proposed to be called, was objected to.

‘ It was said that, being an inhabitant, he was an interested witness.

‘ To this it was answered; That, where, from

(1) *Quære?*

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‘ the

' the nature of the case, no other evidence could
 ' be had, such witnesses as alone had been in a situ-
 ' ation to be acquainted with the facts, ought to
 ' be admitted, otherwise the truth could never, in
 ' such cases, be discovered. That inhabitants were
 ' the only persons likely to have paid attention to
 ' the fact which was meant to be proved by the
 ' testimony of Shephard. That, in similar cases,
 ' courts of justice have admitted witnesses to be
 ' examined, though circumstanced (in point of
 ' interest) like him. As in the case of Willes and
 ' Harris, tried on the Western circuit before Mr.
 ' Baron Eyre, (1774), when certain fishermen
 [274] ' being called by the defendant, (who denied a
 ' right to the tithe of fish as claimed by the plain-
 ' tiff), their evidence was, on the part of the plain-
 ' tiff, objected to, as they had an interest in over-
 ' throwing his claim; but the judge said, that the
 ' objection proved too much, as it would deprive
 ' the defendant of the only means he could have
 ' of proving the custom; and the evidence was
 ' admitted (D). It was also said that Shephard;
 ' (who had been on the parish three years), was
 ' disqualified from voting, and therefore could
 ' derive no advantage from any evidence he might
 ' give in favour of the right of the inhabitants.'

The Committee over-ruled the objection.

' Thomas Shephard being sworn, gave his evi-
 ' dence to the following effect:

' He is 98 years of age. Remembers the elec-
 ' tion in 1695. Had been six years in Poole be-

‘ fore that election. Was a gardener at that time.
 ‘ Mr. Ashley was chosen by the mayor, burgesſes,
 ‘ and *commonalty*. Has heard old people ſay that
 ‘ the *burgeſſes*, kept the *commonalty** out of their
 ‘ rights. Voted *himſelf* in 1695. No oppoſition
 ‘ then. Remembers ſome other elections, (but
 ‘ could give no diſtinct account of them) Went
 ‘ afterwards to ſea. Has offered his vote before he
 ‘ was on the pariſh, and has been ſolicited for his
 ‘ vote. Knows one Lee; (a perſon afterwards
 ‘ called by the counſel for the fitting members),
 ‘ Is a good deal older than Lee; above four
 ‘ years.’

COUNSEL for the Petitioners.

From the whole of the evidence ſince the
 10th year of Queen Elizabeth, it appears, by
 the word “ *commonalty*,” then introduced into
 the charters, is meant the *inhabitants*. That in the
 charters thoſe two expreſſions are uſed interchange-
 ably. That the inhabitants have acted, in many
 inſtances, under the deſcription of *commonalty*.
 That elections and returns have been made by the
 mayor, bailiffs, burgeſſes, and *commonalty* down to
 the year 1695. Therefore, it muſt be underſtood
 that the *inhabitants* concurred in thoſe elections and
 returns. [276]

Their right, therefore, is founded on the general
 common law of Parliament; is unimpeached by
 any original charter, or preſcriptive uſage: is ſup-
 ported, on the contrary, by uſage irrefiſtably proved
 down to 1695, and is only oppoſed by an uſage

of eighty years. But no charter, nor usage, however ancient, if within time of legal memory, can divest a right of election clearly proved to have existed before the date of such charter, or the commencement of such usage.

The substance of the arguments of the counsel for the sitting members, and of the new evidence which they produced, was as follows :

[277] The common law right, as laid down in Glanville, may be admitted, as founded on general, political, and constitutional principles, which is the manner in which he states it. But it cannot be supported as deduced from the history of Parliament. The early periods of representation are too obscure fully to authorize any general system. The right of election in Poole does not depend on any of the charters which have been produced. It is prescriptive. "*Burgenses*," and "*Communitas*," the words employed in those charters, may perhaps comprehend all the inhabitants in some boroughs, but certainly there are many more instances where they are used for a limited part (1) of the inhabitants. The sense in which they are to be taken, in this case, must therefore appear from some arguments or evidence independent of the charters. It must be discovered by the usage of the place.

"*Communitas*" is ill translated "*commonalty*." It should be translated "*community*," which expression never signifies all the inhabitants of a place.

(1) Several instances of this were cited.

The Latin term, in old deeds, for *commonalty* is "*commonalitas*."

It appears that, in many of the charters which have been read, "*communitas*" is used in direct contradistinction to "*inhabitants*." If it is argued, [278] that in those charters, although both words are used, yet they mean the same thing, is it not as fair to say, that although in the corporate name both "*burgenses*" and "*communitas*" are employed, yet they mean one and the same thing; or rather that "*communitas*" is a general cumulative word, comprehending a sort of recapitulation of the separate integral parts specified in the antecedent part of the corporate name?

Indeed, arguments merely drawn from the vague and inaccurate expressions of old charters have very little solidity. The tautology of those instruments is remarkable to a proverb. And it would be in vain to look for legal precision in those of a vice-admiral of England, in the reign of Henry the Eighth, or of Clarencieux king at arms, in the time of Queen Elizabeth.

It is the opinion of some great lawyers, that *inhabitants* as such are incapable of being corporators. The case of Dungannon, which has been cited by the counsel on the other side, seems to show, that they cannot; for the charter to the inhabitants of Dungannon, was determined to be void, by the [279] opinion of all the other judges against Lord Hobart, (12 Co. Rep. p. 121). And they held that inhabitants have not capacity to take an inheritance. (*Ibid*) (E).

The agreement for obtaining the charter is only an act of the persons there specified as *individuals*, not as *corporators*. The exercise of the right of common by the inhabitants of Poole has not been proved. If there could be an incorporation of inhabitants as such, and if the inhabitants of Poole are really entitled to certain corporate rights and franchises, under the charters which have been given in evidence, it does not therefore follow, that they have a right to vote for members of Parliament. That right, in this borough, does not (as has been said already), depend on any charters. It must be discovered by the usage.

EVIDENCE.

‘ Twelve returns were produced in the name of
‘ the mayor, bailiffs, and burgesſes (*only*).

[280]

- ‘ 1. 12 Nov. 26 Eliz.
- ‘ 2. 1 Car. I.
- ‘ 3. 3 Car. I.
- ‘ 4. 1 March 13 Car. I.
- ‘ 5. 23 Feb. 25 Car. II.
- ‘ 6. 3 March in the ſame year.
- ‘ 7. 6 Feb. 31 Car. II.
- ‘ 8. 18 Aug. 31 Car. II.
- ‘ 9. 28 Feb. 33 Car. II.
- ‘ 10. 2 Will & Mar.
- ‘ 11. 4 Nov. 1695. In the ſame year with, but
‘ poſterior to, the return laſt produced by the coun-
‘ ſel for the petitioners.
- ‘ 12. 10 Aug. 1698.

‘ To

‘ To all those returns, as well as to those since
 ‘ 10 Eliz. produced on the part of the petitioners,
 ‘ after the second, the common seal is affixed.

‘ On an examination, by the agents on both
 ‘ sides, of the names in the body of the return of
 ‘ 18 Jac. I. (which was the fourth produced by
 ‘ the counsel for the petitioners) it appeared that
 ‘ two of the persons there named were not to be
 ‘ found entered as *burgesses*, in the corporation-
 ‘ books of that time.

‘ Two witnesses were called.

[281]

‘ William Lee, aged 87, or 88, swore that he had
 ‘ often heard Shephard say, that he was but three
 ‘ or four years older than him. But he had first
 ‘ known him only about fifty-one years ago, long
 ‘ after they were both men. He said he had
 ‘ known Poole seventy years, and that all elections
 ‘ of mayors, sheriffs, and parliament-men, had been,
 ‘ during that time, by *burgesses*.

‘ Mrs. Greenway, aged seventy-nine, remembers
 ‘ the election in 1704, when Mr. Weston (her
 ‘ uncle) was chosen. He was chosen by the *bur-*
 ‘ *gesses*. She never heard of the *inhabitants* voting.
 ‘ Her first husband was a *burgess*.’

COUNSEL for the Sitting Members.

The evidence of the two last witnesses, who never
 heard of the claim of the *inhabitants*, is sufficient
 to overturn the testimony of Shephard, if indeed
 any trust could be put in what he has said, after
 telling the Committee that he voted in 1695,

although, by his own account, he was a minor at that time, and by Lee's, not above thirteen years of age.

But if *inhabitants* did vote in 1695, as there was no contest, and therefore no enquiry into their titles, this cannot prove that their voting as such was allowed on that occasion. There is a return of that year, subsequent to that produced by the counsel for the petitioners, in the name of the *mayor* and *burgesses* only, and the number of returns in the name of *mayor*, *bailiffs*, and *burgesses*, which have been read, from the reign of Queen Elizabeth downwards, through the course of the last century, when *they* contended, that they uniformly run in the name of the mayor, bailiffs, burgesses, and *commonalty*, shows, that in those where the word "*commonalty*" is used, it ought to be interpreted, to be nothing else but a cumulative name of the foregoing integral members of the corporation.

[283] All the returns are sealed with the common seal, and there is no instance of a common seal belonging to *inhabitants* at large.

In 168 $\frac{8}{9}$ the *inhabitants* claimed the right to vote, and the House then disallowed their claim.

There is no appearance of their having ever attempted it before. In the case of 1661 there is not a word said of their pretended right. The recorder of the town, who was one of the candidates, and was supported by the *inhabitant burgesses*, would surely have availed himself of the votes of the *inhabitants* at large, if he had thought there was any pretext

pretext that they had a right to vote. He had then been recorder twenty years. (This was proved from the books,) Therefore we must suppose that during that time the inhabitants had never been considered as entitled to vote, and, in fact, never had voted. This carries the usage up to 1641, (*i. e.* 140 years ago;) and this being opposed by nothing but uncertain argument and implication, must be considered as evidence of prescriptive usage.

The sitting members might rest their cause on this ground, but they are entitled to the benefit of the decision in 168⁵, which, for the reasons given at the opening of the cause, ought to be considered as a determination within the meaning of the statute. [284]

In reply, the counsel for the petitioners answered the arguments which had been used on the other side, and enlarged upon and enforced those formerly employed in favour of the right of the inhabitants, at great length.

It was said,

If "*communitas*" were to be translated "*community*," that word would comprehend the inhabitants, as well as *commonalty*.

"King Edward the Fourth, by a patent letter, granted to the burgeses and *inhabitants* of New Windsor, that they should be a body, and perpetual corporate *community*. Madox Firma Burgi, p. 28, 29."

This instance, among many others, shows likewise

wife that *inhabitants* may be a corporation.—The Case of Abingdon, 23 May, 1660 (1) is a determination of the House of Commons that they may. If so, they may have a common seal, which is only a badge of incorporation, and it is most evident, from the charter of Clarendieux, in the reign of Queen Elizabeth, that the common seal of Poole belongs to the inhabitants. If the common seal belongs to them, the returns produced on the part of the sitting members are, in law, to be considered as acts in which the inhabitants concurred, as much as if the words “*inhabitants*” or “*commonalty*” had been used in those returns.

The right of common, herbage, and turbary, as enjoyed by the inhabitants of Poole, under grants to *burgesses*, has been proved in a manner sufficient to satisfy any one who will not shut his eyes to the truth. “*Commonalty*,” therefore, in the latter, and “*burgenses*” in the more early charters and returns of this borough, are proved to mean “*inhabitants*.”

[286] The argument built on the supposed inaccuracy of old charters would, if taken in its full extent, invalidate those charters entirely. It is only from the fair construction of the terms and descriptions in such charters that we can discover the persons to whom the grants, contained in them, are made; and although a vice-admiral, or a king at arms, cannot, either in the days of Henry the Eighth, or

(1) *Vide supra*, Case of Pontefract, vol. i. p. 405, 406.

Elizabeth, be supposed to have been able to pen a legal instrument with precision, no more than they probably can in our own, yet we must suppose that, where very important privileges and immunities were in question (as in the charter of Arthur Plantagenet), they then had, as they certainly could have, the assistance of very able lawyers, in drawing the instruments which were to convey or confirm those privileges.

The counsel on the other side have said that, in some of the charters, the words "*commonalty*" and "*inhabitants*" are both used and distinguished from each other; but, if there are a few passages in some of them which seem to favour that assertion, they must be ascribed to an over anxiety to use as general and comprehensive terms as possible. In the charter of the 10th of Queen Elizabeth the mayor, bailiffs, burgeses and commonalty and their successors, and all other inhabitants and burgeses of Poole are exempted from toll, passage, bridgeway (1), &c. It may as well be contended that "*other burgeses*" implies a different class of men from "*burgeses*" in the first part of that sentence, as that "*inhabitants*" was intended to mean something different from "*commonalty*." [287]

The petition of 1758, in the name of the mayor, bailiffs, burgeses, and commonalty, and signed by several inhabitants (not burgeses), and the mortgage of the market, in the name also of mayor,

(1) *Supra*, p. 255.

bailiffs,

bailiffs, burgesſes and *commonalty*, and in which the inhabitants muſt have concurred, afford arguments, which have not been attempted to be answered,

[288] that in the corporate name of this borough, the word "*commonalty*" comprehends "*inhabitants*."

On Wedneſday, the 29th of March, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the two fitting members were duly elected (1). *

(1) Votes, p. 454.

* [At the general election in 1790, Lord Daer and Lord Haddo ſtood on the right of the commonalty, and the Hon. Col. Charles Stuart, Mr. Liſter, Mr. Taylor, and Mr. Kingſmill, on the limited right. That Committee (22 Feb. 1791) determined that the right was according to the ſtatement delivered in (under 28 G. III. c. 52. § 15.) on the part of thoſe laſt-mentioned gentlemen,

" in mayor, bailiffs, and bur-
 " geſſes only." The ſtate-
 ment delivered in by the other
 ſide was, " That the inhabi-
 " bitants, houſeholders of the
 " borough and county of the
 " town of Poole, paying ſcot
 " and bearing lot, are, as
 " ſuch, members of the cor-
 " poration of the ſaid borough,
 " and legal electors of the
 " members to ſerve in parlia-
 " ment for the ſame."]]

N O T E S

ON THE CASE OF

P O O L E.

PAGE 249, (A.)

CASE of Colchester.

“ 28 March, 1628. Report made from the Committee of privileges by Mr. Hackwill,—

“ For Colchester: only one return made by the bailiffs, in which Sir Tho. Cheeke and Mr. Alford returned.

“ That the bailiffs, aldermen, and common council, consisting of 42, in an upper room, read the writ, and there elected Sir Thomas Cheeke, and Mr. Alford: In a lower room, the common sort of burgeses in general elected Sir Tho. Cheeke, and Sir Wm. Masham.—

“ That the bailiffs, &c. made their prescription by election, as they now made it.—

“ Against this alledged, that till Richard the First no bailiffs; from thence till Edward the Fourth no common council. Then 16 appointed, by a new charter, which, by the constitutions sithence, they have encreased, to—

Upon this the prescription holden insufficient.—

“ That the Committee also of opinion, that the election [290]
“ of

“ of Sir William Mafham good ; and Sir William
 “ Mafham’s name to be put in *by the bailiff* (1), instead of
 “ Mr. Alford.

“ Upon question, Sir William Mafham duly elected ;
 “ and Sir William Mafham his name to be, by one of the
 “ bailiffs now in town (1) inserted in the indenture of re-
 “ turn, in the place of Mr. Alford. Which accordingly
 “ presently done at the board.” Vol. i. p. 876, col. 2. 877.
 col. 1.

CASE of Boston.

“ 8 May, 1628. Mr. Hackwill reporteth from the Com-
 “ mittee of priviledges, the case of Boston in Lincolne-
 “ shyre.—Mr. Bellingham the recorder, and Mr. Okeley
 “ chosen. The question whether a select number, or the
 “ commonalty were to chose. Sir A. Irby chosen by ma-
 “ jority of voices of the *commonalty*, and fourteen of the se-
 “ lect number (2).

“ Agreed by the Committee, that the election of burgesses,
 “ in all boroughs, did, of common right, belong to the
 “ commoners ; and that nothing could take it from them,
 “ *but a prescription, and a constant usage beyond all memory.*

[291]

“ 1. Upon question, the right of election for burgesses,
 “ to serve in Parliament, for Boston, resteth in the *com-*
 “ *monalty*, and not in the mayor, aldermen, and common
 “ council.

“ 2. Upon question, Mr. Okeley not duly elected or re-
 “ turned.

“ That Sir An. Irby duly elected, and ought to have been
 “ returned.

(1) *Vide supra*. Vol. I. p. 90, note at the bottom of the page :
 &c. Introduce, Note (W). *In the margin is written by the*

(2) In the printed Journal in clerk. “ *Quere* the report at large
 this place there is the following “ of Mr. Hackrill.”

“ 4. That

" 4. That the mayor of Boston shall be sent for, to put out Mr. Okeley's name, and put in Sir A. Irby's." Vol. i. p. 893. col. 2.

These cases apply exactly to show, that no usage within time of memory can narrow the right of election.

P. 257. (B)

CASE of Bridport.

" 12 April, 1628. Mr. Hackwill reporteth from the Committee for privileges, the case of the borough of Bridport—

" The question, whether the commons, or only the [two] bailiffs, and 13 capital burgesses, are electors [there; the] last claiming that sole power by prescription, ** this proved by 2 witnesses for 40 years, *** claimed it, but were denied. A certificate of disclaimer, under the hands of 80 commoners, offering to justify it upon oath; and affirmed, they could have proved it by 40 commoners more.—

" On the other part, records produced: 1^o, 6^o Ed. VI. Indenture returned the election to be *per ballivos, per assensum communitatis*. 2^o & 3^o Phil. & Mar. election returned *accordant* 1^o Eliz. *accordant*. 1^o Jac. *accordant*.—

" This also proved by two witnesses: Above 40 commoners gave voices, 1^o Jac. [292]

" Another, that about 60 years ago the commoners had voice; and that he himself, then a commoner, gave voice.

" Affirmed by one of the members of this house, that one of the now bailiffs confessed to him, the commoners had voice—

" Replied to this, that the addition of the commonalty; because that the name of the corporation: That so they make their leases, yet the commoners never meddle.—

" Exception

“ Exception to one of the witnesses, that a commoner,
 “ and a very aged man, scarce could hear or be heard:
 “ That the other had been disfranchised, and therefore
 “ spake out of spleen.—

“ Alledged further, that 1 *Jac.* the commons called, be-
 “ cause they were to contribute to Mr. Pitt’s wages —

“ Agreed by major part of the Committee, that the com-
 “ moners had voices in the election.

“ Resolved also here, no good election ; because the
 “ commons having right of voice, had no warning ; as
 “ they ought to have had.

“ Upon question, the *commonalty* in general ought to have
 “ voices in the election of the burgesses for the Parliament.

“ Upon question, the election void, in respect of the
 “ want of warning to the commonalty. A new writ for a
 “ new election.” Journ. vol. i. p. 882. col. 1, 2.

[293]

At a future period the House resolved, (2 March 1762)
 “ That in the last determination of this House, of the right
 “ of election of members to serve in Parliament for the
 “ borough of Bridport, in the county of Dorset, made the
 “ 12th day of April, 1628 ; which is as followeth ; “ That
 “ the commonalty in general, &c.” The words com-
 “ monalty in general,” extend only to *inhabitants house-*
 “ holders paying scot and lot. Journ. vol. xxix, p. 205.
 col. 2. p. 205. col. 1.

This explanation of the word “ *commonalty* ” is exactly
 that which the counsel for the petitioners contended for in
 the present case.

CASE of Warwick.

“ 31 May, 1628. Mr. Hackwill reporteth from the
 “ Committee for privileges, &c. the case of Warwick.—
 “ Question, whether the election to be made by the mayor
 “ and common council, or by the commons in general (1).

(1) In the printed Journals “ (a) In the margin is written
 there is the following note at the by the Clerk, “ *Quære* the report
 bottom of the page : of Mr. Hackwill.

That

" That a petition produced, whereby about 200 commoners disclaim to have any right of election; but that
" refused to be accepted by the Committee, because, if but
" one commoner appear to sue for his right, they will hear
" him.

Note
(B.)

" Upon question, the right of election, for the town of
" Warwicke, belongeth to the *commonalty*." Journ. vol. i.
" p. 907. col. 2.

" On a future occasion the House resolved, (31 Jan.
" 1723,) that the right of election of burgesses to serve in
" Parliament for the borough of Warwick, is in such per-
" sons only who pay to church and poor in the said borough."
Vol. xx. p. 114. col. 2.

[294]

Here too by this second resolution it appears, that the
word "*commonalty*" in the first has been understood to mean
inhabitants. There were several returns produced in 1723,
of a date posterior to the resolution of 1628, which run
thus, "*Burgenses & inhabitantes elegerunt*." Journ. *ibid*.
col. 1.

P. 271. (C.) The entry of that Case is as follows: 16
May, 1661. " Serjeant Charlton reports from the Com-
" mittee of privileges and election, touching the double re-
" turn for the town of Poole, That John Morton, Esq. and
" William Constantine, Esq. are returned by one indenture;
" and John Morton, Esq. and Sir John Fitzjames by another
" indenture; and all by the chief officers; and the opinion
" of the Committee, that both Mr. Constantine and Sir
" John Fitzjames do forbear to sit in this House, till the
" merits of the cause touching their elections be determin-
" ed." The House agreed with the resolution of the Com-
mittee. Vol. viii. p. 251. col. 2.

Note
(C.)

" 15 June, 1661. Serjeant Charlton made report from
" the said Committee, touching the difference between
" William Constantine, Esq. and Sir John Fitzjames, Knt.
" concerning their elections for the town of Poole in the
Vol. II. R " county

Note
(C.)

“ county of Dorset; that the first question before them was,
“ whether the out-burgeses of the said town of Poole had
“ voices as well as the in-burgeses; and the opinion of
“ the Committee, that the out-burgeses had equal voices
“ in the elections with the in-burgeses: and that the second
“ question being, who had the majority of voices, it ap-
“ peared, that Sir John Fitzjames had much more the ma-
“ jority of voices, and was duly elected one of the burgeses
“ for the said town of Poole; and the opinion of the Com-
“ mittee, that the said Sir John Fitzjames was duly elected
“ one of the burgeses of the said town of Poole, and ought
“ to sit.

“ Resolved, That this House agree with the said Com-
“ mittee, that Sir John Fitzjames was duly elected one of
“ the burgeses for the said town of Poole, and ought to sit
“ in this House.” Journ. same vol. p. 272. col. 1.

Note
(D.)

[296]

P. 274. (D.) The gentleman* who cited that case, and was counsel in it, on the circuit, has favoured me with the following state of it. It was a cause which originated in the Exchequer, upon a bill brought by the plaintiff as impropiator of tithes in the parish of St. Keavine, in Cornwall. The court directed an issue, which was tried at the summer assizes in 1774, before Mr. Baron Eyre. Several fishermen being called on the part of the defendant, to prove the manner of tithing fish, their evidence was objected to by the counsel for the plaintiff, they having an interest to negative the claim. The judge over-ruled the objection, upon the ground stated in the present case. The counsel for the plaintiff then objected to any witnesses being admitted who had followed the occupation of fishermen within six years, as within that time they were liable to be called upon to pay the tithes, if the plaintiff were to succeed. This objection was allowed by the judge, who

* Mr. *Alleyne*.

ruled,

ruled, that no witnesses, who had followed the occupation of fishermen within six years from the day of their examination, should be admitted.

Note
(D.)

P. 279. (E.) If the case of Dungannon, as reported in the 12th part of Lord Coke's Reports, p. 121. (which, by the bye, is not of equal authority with the other parts which were published by himself), and by Lord Hobart, p. 15. is attentively considered, and compared with what Lord Holt is made to say in the case of Ashby and White, both by Lord Raymond (1) and Salkeld (2), it will appear, that both those cases are in favour of the capacity of the *inhabitants* of a place, as such, to be made a corporation. Lord Hobart thought, in the case of Dungannon, that the King might *ordain* (distinguishing between *that* and *granting*) that the inhabitants of any place, without their being previously incorporated, should send members to Parliament. This was the point on which all the other judges differed from him, according to Lord Coke's account of the case; and Lord Holt, in Ashby and White, only adopts their opinion upon this point. Lord Coke, indeed, goes on to say, that it was so holden, "Because *inhabitants* have not capacity to take an inheritance;" but, from the context, it is clear that this must mean "*inhabitants not incorporated*;" and it is not said, either by Coke or Holt, that inhabitants may not be incorporated; nor even, that, if incorporated, they could not then, as a corporate body, be capable of a grant to choose members to Parliament. The case of Dungannon was shortly this: The King constituted the town of Dungannon to be a free borough by a charter, in which was the following clause: "*Et ulterius volumus declaramus, & constituimus quod inhabitantes villæ predictæ sint unum corpus incorporatum, per nomen præpositi, 12 burgensium, & communitatis Dungannon, et per idem nomen pla-*

Note
(E.)

[297]

(1) 2 Lord Raymond, p. 951. (2) 3 Salk, p. 18.

Notes
(B.)

[298]

"*citare possint, & quod ipsi prædicti præpositus, & burgenfes,*
 "*& successores sui habeant potestatem eligendi duos burgenfes,*
 "*&c. ad Parliamentum, &c.*" "The doubt (says Lord
 "Coke) was, whether this grant of election of burgesfes of
 "Parliament was good, for because it was granted but to
 "parcel of the body, *scil.* to the provost and burgesfes, and
 "not to the provost, burgesfes, and commonalty." It was
 holden that the grant must be to the whole body, although
 the exercise might be limited to a partial number of that
 body. (Lord Raym. 952.) This shews that the legal
 creation of the whole body was not questioned. As the
 grant was to a partial number of the corporation, it was
 considered as if it had been to a number of individuals; and
 the principle of the determination was, that a congregate
 number of individuals, though called *præpositus & burgenfes*,
 could not take an inheritance. To illustrate this, the ques-
 tion of a grant to *inhabitants*, as such a *congregate number*
of individuals, was introduced, and, according to that prin-
 ciple, *they* certainly could not take an inheritance.

How far the right to send members to Parliament is such
 an inheritance, or real right (as Holt otherwise expresses it),
 of which *inhabitants* not incorporated are incapable, is very
 questionable. Lord Holt, in *Ashby and White*, lays it
 down, that the right of voting in a borough, when that right
 is derived from prescription, is a real right, attached to the
 burgage lands; and that, since the time of legal memory,
 the King cannot grant it to inhabitants in general not in-
 corporated. But experience shews, that there are places
 where the *inhabitants* have acquired that right within time
 of memory, though not incorporated.—Westminster is one.
 The learned Editor of the new Edition of Lord Coke's
 Commentary has collected a great deal of very curious ma-
 terials relating to the legal history, and antiquities of that
 city, with which I hope he will, some time or other, oblige
 the public. In his manuscript, part of which I have per-

rufed, he demonstrates, that the city and liberty of Westminster is not, and never was, a corporation; yet the * privilege of sending members to Parliament was not enjoyed by Westminster till the 1st of Edward the Sixth. (See Willis's Not. Parl. vol. i. p. 7. of the Preface). The other part of Lord Holt's doctrine, viz. That, in boroughs sending members to Parliament by prescription, the right of voting is only in those possessed of burgage lands, is discussed in the Case of Pontefract, *supra*, vol. i.

Note
(E.)

XIX.

**THE
C A S E**

Of the BOROUGH of

SHAFTON, otherwise SHAFTESBURY,

In the County of DORSET.

The COMMITTEE was chosen on Tuesday, the 28th of March, and consisted of the following Gentlemen :

Sir George Yonge, Bart. Chairman	} Members for	Honiton.
John Peach Hungerford, Esq. - -		Leicestershire.
Henry Watkin Dashwood, Esq. - -		Wigtown, &c.
Sir George Robinson, Bart. - -		Northampton.
Abel Smith, Esq. - - - - -		Aldbrough, Yorksh.
James Sutton, jun. Esq. - - -		Devizes.
Sir John Duntze, Bart. - - -		Tiverton.
William Drake, jun. Esq. - - -		Agmondesham.
Francis Annesley, Esq. - - -		Reading.
Hon. Geo. Venables Vernon - - -		Glamorganshire.
Asheton Curzon, Esq. - - -		Clitheroe.
Rowland Holt, Esq. - - - - -		Suffolk.
Sir Richard Worsley, Bart. - - -		Newport, Hants.
N O M I N E E S		
<i>Of the Petitioner :</i>		
Lord Guernsey - - - - -		Maidstone.
<i>Of the Sitting Members :</i>		
George Clive, Esq. - - - - -		Bishop's castle.

P E T I T I O N E R :

Hans Wintrop Mortimer, Esq.

Sitting Members :

Francis Sykes, Esq. Thomas Rumbold, Esq.

C O U N S E L

For the Petitioner :

Mr. Hardinge, Mr. Macdonald.

For the Sitting Members :

Mr. Wilson, Mr. Arden; and Mr. Potter (in Mr. Wilson's
absence.)

THE
C A S E

Of the BOROUGH of

SHAFTON, otherwife SHAFTESBURY.

ON Wednesday, the 29th of March, the Committee being met, the petition was read, setting forth; That the two sitting members by themselves, and their agents, had been guilty of many gross and notorious acts of bribery, and corruption, whereby many of the voters were influenced to give their votes for them; and that the returning officer had admitted persons not duly qualified to vote for the sitting members, and had rejected the legal votes of others, who had tendered them for the petitioner (1).

The last determination of the House was read, and is as follows :

29 February, 169 $\frac{1}{2}$, Resolved, “ That the right [304]
“ of election of burgeses to serve in Parliament

(1) Votes, 6 Dec. 1774, P. 34, 35.

“ for

“ for the borough of Shaftesbury, in the county
 “ of Dorset, is only in the inhabitants of the said
 “ borough, paying scot and lot (1).”

Then the standing order of the 16th of January,
 173 $\frac{1}{2}$, was read (2).

The numbers on the poll, as produced by the
 mayor, were,

For Sykes - - - - -	284
For Rumbold - - - - -	248
For Mortimer - - - - -	122

The two objects of the counsel for the petitioner,
 in this cause, were to prove,

1. That the sitting members, by themselves or
 their agents, had been guilty of bribery, so as not
 to be entitled to retain their seats.

[305] 2. That there were so many of the voters for the
 sitting members affected by bribery, or not *bond
 fide* inhabitants, or who had not paid scot and lot,
 that by striking them off the poll, a majority must
 remain in favour of the petitioner, and he be en-
 titled to be declared duly elected.

The counsel for the sitting members, besides en-
 deavouring to defeat the evidence produced on
 the two foregoing heads, attempted to show, that
 Mortimer had promised money in order to pro-
 cure himself to be elected, and that he was thereby

(1) Journ. vol. ii. p. 479, col. 1, and 2.

(2) *Supra*, vol. i. p. 99.

incapable of sitting, even if he should make out a majority of good votes.

It is evident, from this short account of the general complexion of the cause, that, with regard to each candidate and agent, and each individual voter objected to, a distinct issue was joined, between the parties, viz. with regard to the candidates, "*guilty of bribery, or not;*" with regard to the supposed agents, "*agent, or not;*" and also, "*guilty of bribery, or not;*" and with regard to the voters, "*bribed, or not;*" "*bond fide inhabitant, or not;*" "*paying scot and lot, or not.*"

On each of these issues, the Committee, in the capacity of a jury, were to find a verdict; and, [306] upon comparing the result of those verdicts, must have formed their ultimate determination.

There were, however, several points started with regard to the meaning and effects of the law concerning bribery; but from the manner in which the cause was conducted, it is impossible to discover with certainty, by the event, what the opinion of the Committee was upon those points. The counsel indeed formed their conjectures, but, as those conjectures can be of no authority, it would be improper to insert them here. The principal questions on the subject of bribery, which were argued by the counsel in this and the other causes, where there was occasion to go into that subject, will find a place, in a note subjoined to the Case of St. Ives (1).

(1) Vide *infra*, Case of St. Ives, note (B).

[307] In the course of the trial (which, from the time of the appointment of the Committee, to that of their making their report to the House, lasted four weeks,) many points of evidence arose, and were argued by the counsel. Some of them were as follows :

Money, to the amount of several thousand pounds, had been given among the voters, in sums of twenty guineas a man. The persons who were entrusted with the disbursement of this money, and who were chiefly the magistrates of the town, fell upon a very singular and very absurd contrivance, in hopes of being able thereby to hide through what channel it was conveyed to the electors. A person, concealed under a ludicrous and fantastical disguise, and called by the name of Punch, was placed in a small apartment, and through a hole in the door, delivered out to the voters, parcels containing the twenty guineas; upon which they were conducted to another apartment in the same house, where they found a person called Punch's secretary, and signed notes for the value, but which were made payable to an imaginary character, to whom they had given the name of Glenbucket. Two of the witnesses, [308] called by the counsel for the petitioner, swore that they had seen Punch through the hole in the door, and that they knew him to be one Matthews, an alderman of Shaftesbury, and, as the counsel for the petitioner had endeavoured to prove, an agent for the sitting members.

The

The counsel for the sitting members proposed to all Matthews himself, to prove an *alibi*.

This was objected to, and the point being argued,

The Committee resolved,

Not to admit the evidence.

On the part of the petitioner, witnesses were called to prove declarations of voters, who at the poll had taken the bribery oath, that they had received Punch's money.

This was objected to by the counsel on the other side. They said,

That this was not legal evidence, for that, if such declarations were proved, still they could not be considered as proving the receipt of the money. That it would be unjust to suffer what a man had said in conversation, and without an oath, to invalidate what he had solemnly sworn. That in the two Cases of the counties of Hertford and Surrey, where there was a question of evidence exactly similar to this, the Committee of elections had come to the following resolution,

[309]

16 January, 169 $\frac{1}{2}$, Resolved, " That it is the opinion of this Committee, that evidence ought not to be admitted to disqualify an elector, as no freeholder, who, at the election, swore himself to be a freeholder."

And, in both cases, the House agreed to the resolution of the Committee (1).

(1) Journ. vol. xi. p. 393. col. 2. 394. col. 1.

a new writ (for the vacant seat) till after that day (1).

On the 4th of May, several parts of the minutes of the evidence taken before the Committee being read, both the resolutions of the Committee were unanimously agreed to by the House, and it was ordered, that the Speaker should not issue his warrant for a new writ, until the House had proceeded to take the minutes of the examination taken before the Committee into further consideration.

Then the two following resolutions were come to,

“ Resolved, That it appears to this House, that
 “ it is too late to proceed to take the said minutes
 “ into further consideration in this session of Par-
 “ liament.

[313] Resolved (unanimously) “ That it will be highly
 “ expedient, that the House do proceed, to take
 “ the same into consideration, as early as possible,
 “ in the next session of Parliament.”

And, it was ordered,

“ That it be an instruction to the gentlemen,
 “ who are appointed to prepare and bring in a bill,
 “ to explain and amend an act, made in the 10th
 “ year of the reign of his present Majesty, inti-
 “ tuled, An Act to enable the Speaker of the
 “ House of Commons, to issue his warrants, to
 “ make out new writs, for the choice of members

(1) Votes, 566.

“ to serve in Parliament, in the room of such members as shall die during the recess of Parliament (1), “ that they do make provision in the said bill, that no writ be issued for the borough of Shafton, otherwise Shaftesbury, in the county of Dorset, by virtue of the said act, “ during the next recess of Parliament (2).”

That *very* day leave had been given to bring in [314] such a bill (3), which was afterwards brought in and passed into an act, (15 Geo. III. cap. 36) (4), and it is thereby provided, that, if a vacancy happen for Shaftesbury during the recess, (by any of the events in the case of which the Speaker, by that statute, and the statute of 10 Geo. III. cap. 41. is authorized and required to issue a warrant for a new writ,) the Speaker shall not be enabled to issue a new writ (B), “ because *that* might tend to “ defeat those measures which it may be proper “ to take in consequence of the said notorious “ bribery and corruption (5).” The former part of the same section recites, “ That it has appeared “ to the House of Commons, that there was the “ most notorious bribery and corruption at the “ last election for Shaftesbury.”

- | | |
|---|--|
| (1) <i>Vide supra</i> , Introd. vol. i.
p. 81. | (4) <i>Supra</i> , Introd. vol. i.
p. 81. |
| (2) Votes, p. 627, 628. | (5) Sect. 4. |
| (3) Votes, p. 624. | |

NOTES

ON THE CASE OF

SHAFTESBURY.

Note
(A.)

PAGE 309. (A). There is a determination of the House posterior in time, on this very point of evidence, in the case of the county of Bedford, directly contrary to the resolution in the cases of Hertford and Surrey.

“ 28 June, 1715. A motion being made, and the question being put, that the counsel for the petitioners be admitted to give parole evidence as to a person's being no freeholder, who swore himself to be a freeholder at the time of the election;”

“ It passed in the affirmative, on a division, 98 to 66.”
Journ. vol. xviii. p. 190. col. 1.

The standing order of the House, of 22 Nov. 1717 (1): by which it is declared, that a man's qualification to be a member of Parliament may be disputed, although he shall have previously sworn to it, is also in direct contradiction to the principle of the two cases of Hertford and Surrey; so that those cases cannot have any weight, although the So-

(1) *Vide infra*. Case of Clackmannan.

Notes on the Case of Shaftesbury.

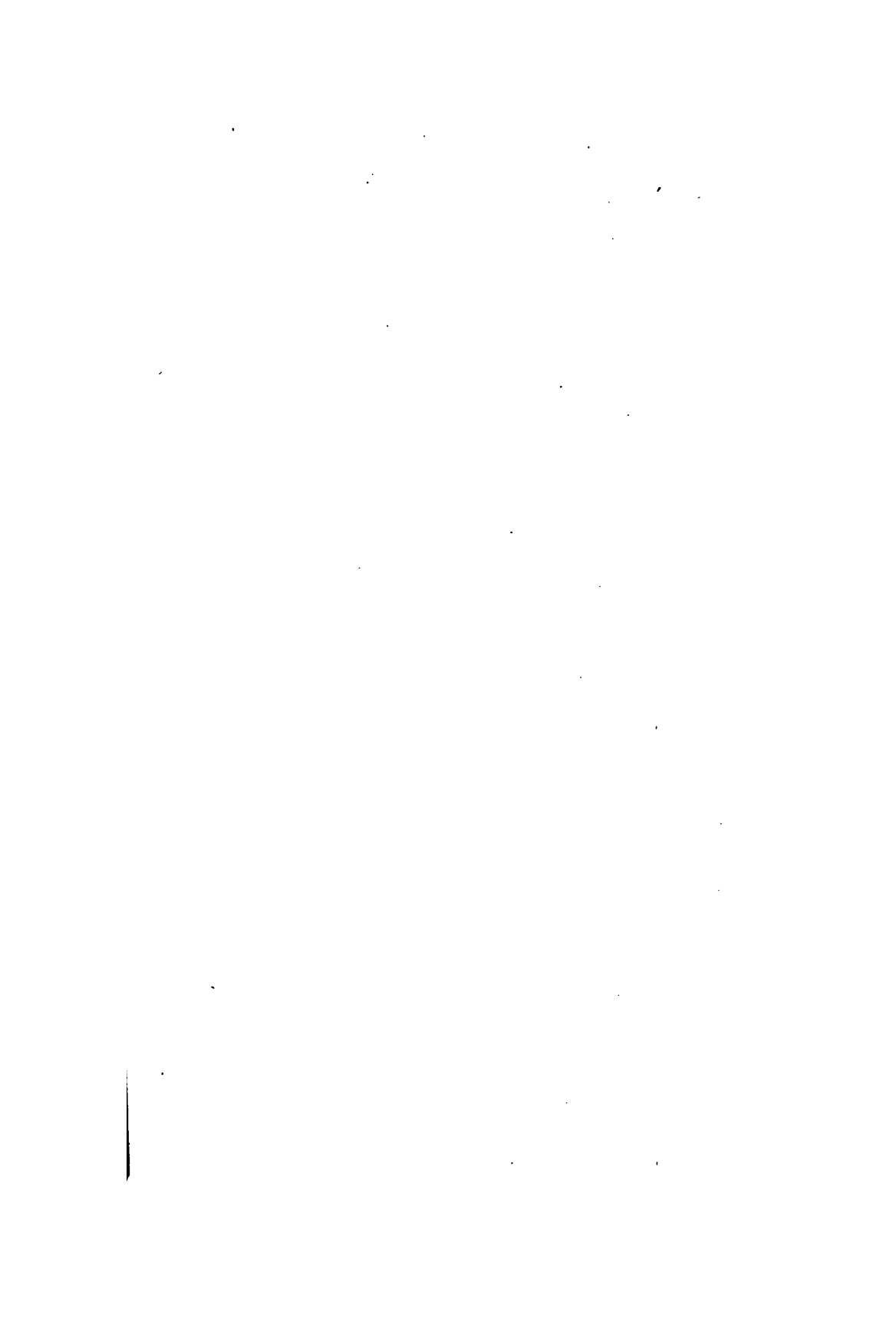
316

licitor General was chairman, and made the report, in the case of Hertford. Journ. vol. xi. p. 393. col. 2:

Note
(A.)

P. 314. (B.) A Clause of this sort was not necessary with regard to Hindon, because the election for *both* seats having been declared void, no vacancy could happen during the recess.

Note
(B.)



XX.

THE
C A S E

Of the BOROUGH of

H A S L E M E R E,

In the County of SURREY.

The Committee was chosen on Friday the 31st of March
and consisted of the following Gentlemen :

Paul Fielde, Esq. Chairman

John Elwes, Esq.

Christopher Griffith, Esq.

John Morgan, Esq.

William Nedham, Esq.

Hon. James Stuart

William Philips, Esq.

Viscount Bulkeley

Sir Adam Ferguson, Bart.

Sir George Macartney, K. B.

Filmer Honywood, Esq.

Sir Henry Hoghton, Bart.

Edward Phelps, Esq.

Hertford.

Berkshire.

Berkshire.

Monmouthsh. -

Winchelsea.

Bute and Cairn -

Boroughbridge -

Anglesea.

Ayrshire.

Ayr, &c.

Steyning.

Preston.

Somersetshire -

Members for

Whitchurch -

Bedfordshire -

NOMINEES,

Of the Petitioners :

Right Hon. Thomas Townshend -

Of the Sitting Members :

Robert Henley Ongley, Esq. -

PETITIONERS :

William Burke, Esq. and Henry Kelly, Esq.

Certain Inhabitants Freeholders, and legal Voters of
Borough of Haslemere.

Sitting Members :

Thomas More Molyneux, Esq. Sir Merrick Burre

COUNSEL,

For the Petitioners :

Mr. Cox, Mr. Alleyne, and (on his return from th

Mr. Bearcroft.

For the Sitting Members :

Mr. Wilson,

Mr. Arden.

THE
C A S E
Of the BOROUGH of
H A S L E M E R E.

ON Saturday, the 1st of April, the Committee being met, the two petitions were read.

That of Mr. Burke and Mr. Kelly alledged in general terms ; That the two fitting members had been guilty of undue and illegal practices ; That votes had been admitted, though not legal, for the fitting members, and that the majority of legal votes were in favour of the petitioners (1).

The other petition stated specially the right of election in Haslemere as determined by the House, and that it is a borough by prescription, and alledged ; That of late years the practice of splitting

(1) Votes, Dec. 6. p. 35.

and dividing freeholds within the said borough, for election purposes, hath prevailed to so great a degree, that, if the same is not remedied, and effectually prevented for the future, the privileges and franchises of the petitioners will be destroyed, and the ancient and true constitution of the said borough totally subverted; and that at the last election, when Mr. Burke, Mr. Kelly, and the fitting members, were candidates, great innovations were made on the ancient and true right of election of the said borough; and a great number of persons admitted to vote for the fitting members, in respect of freeholds illegally split and divided; and several persons who were not inhabitants of the borough, others not freeholders, others, whose pretended freeholds were parcel of the waste ground of the said borough and manor, others whose freeholds do not lie within the said borough and manor, and several persons receiving alms, were admitted to vote for the fitting members, contrary to the right of election; and that Mr. Burke and [321] Mr. Kelly had the majority of legal votes, and ought to have been returned (1).

The last determination of the right of election, in Haslemere, is as follows :

May 20, 1661. Resolved, "That the inhabitant freeholders there (*i. e.* in Haslemere) have only " voice in elections (2)."

(1) Votes, 6 Dec. 1774. (2) Journ. vol. viii. p. 255.
p. 35, 36. col. 1.

This was explained by a resolution of the House in 1755.

24 April, 1755. Resolved, "That, in the last determination of the House, of the right of election of burgesses to serve in Parliament for the said borough of Haslemere, in the county of Surrey, made the 20th day of May, in the year 1661, which is as followeth, viz. *That the inhabitant freeholders there have only voice in election*; by the word "*freeholders*" is meant only freeholders of messuages, lands, or tenements, lying within the borough *and* manor of Haslemere, whether the same *pay* rent to the lord of the said borough and manor, or not, exclusive of any [322] lands or tenements which are or have been parcel of the waste ground of the said borough and manor, or any messuages or buildings which are or shall be, standing or being thereon (1)."

(It is understood not to be necessary that the voters should *occupy* the freeholds for which they vote. It is enough that they live in Haslemere, and have freeholds there).

At the beginning of this very tedious cause, the counsel for the petitioners were going into evidence, tending to shew that only persons paying, or who, from their tenure, were liable to pay, a rent to the lord, have a right to vote. It is essential to burgage tenements that they pay a rent to the lord, so that this would have made Haslemere

(3) Journ. vol. xxvii. p. 293. col. 2.

a burgage-

a burgage-tenure borough. The counsel for the fitting members objected to the evidence, as contradicting the explanatory resolution of 1755.

* The counsel for the petitioners contended,

That by the words "whether the same *pay* rent to the lord of the said borough and manor or not," was only meant "whether they *de facto* pay or not," but that it was still competent to them to shew, by evidence, that none can vote, but those who *ought* by the nature of their tenure to pay to the lord.

On the other side it was said,

That the words of the resolution mean "persons bound by law to pay," for that the House must be supposed to have presumed that persons who were bound to pay, did pay, and therefore that to say, "*Whether the same pay, or not,*" was the same thing as to say, "*Whether the same are holden by paying, or not,*" or "*Whether the freeholders are bound to pay, or not.*"

The Committee, having directed the court to be cleared, after deliberation among themselves,

[324] Resolved, That the counsel for the petitioners should not be admitted to produce evidence, tending to shew that only persons *paying*, or *liable to pay*, a rent to the lord, have a right to vote.

The numbers, on the returning officer's poll, stood as follows:

For

H A S L E M E R E.

324

For the fitting members	- -	61
For the petitioners	- - -	40
		—
Majority	- -	21

The counsel for the petitioners objected to 47 of the voters for the fitting members, on several different grounds.

I. To 35, as voting for tenements split within the meaning of the statute of King William (1).

II. 6, As claiming their right from freeholds without the manor.

III. 1, His property being leasehold, and part of the waste.

IV. 2, As having no interest but a rent reserved on a term.

V. 3, As not having freeholds.

VI. To 6 of the above they likewise objected the receipt of a charity called Smith's charity.

VII. And to some, in opening their case, bribery; but this last objection they thought proper afterwards to wave. [325]

From this state of their objections, and from those of the counsel on the other side to the votes of the petitioners, which will be mentioned afterwards, it will appear, that the cause divided itself into a great variety of separate questions, which, however, were not separately argued and decided, as has been practised in some of the foregoing cases. Each question was accompanied with a great deal

(1) 7 & 8 Will. III. cap. 25, § 7.

of

of complicated evidence, both parole and written, which would have required a very close attendance in order to collect and digest it; and, after all, the labour would have been as fruitless, as difficult and irksome, since the nature of the cause was such as rendered it impossible to deduce from the general determination of the Committee, their opinion on the particular points. I confess, therefore, that I was neither able nor very desirous to obtain a complete history of the whole. It may have its use, [326] particularly to persons connected with this borough, to state the general points both of evidence and argument, as I was able to gather them, from the opening of the counsel on each side, and from the information with which they have since favoured me.

On the first head of objection, the counsel for the petitioners contended,

1. That all freeholds of which an unity of tenement can be proved till 1696, when the statute of King William passed (1), but which have since been divided, are to be considered as split within the meaning of that statute, and are therefore incapable of carrying legal votes.

2. Or, that they are, at least, *prima facie*, to be presumed to have been divided for election purposes, and the votes to be holden to be void, the onus of proving the contrary falling upon the voter.

(1) For the words of the statute, *vide supra*, vol. i. p. 217. Case of Downton.

3. Or,

3. Or, that, from the time that those divisions of freeholds can be proved to have become very general in any place, they* are to be considered as within the operation of the statute.

4. Or, *prima facie*, to be presumed to be so.

5. Or, lastly, (if even that were thought too broad a proposition) that all votes for freeholds divided about the time of an election are, *prima facie*, to be taken to be within the meaning of the statute, and that the voter must prove the division to have been made *bonâ fide*, and not to serve the purpose of the election.

They cited the cases of Whitchurch, and of Weymouth and Melcombe *Regis*.

In the former, the House came to the following resolution, which is the last determination with regard to the right of election in that place.

21 December, 1708. Resolved, " That the
" right of electing burgeses to serve in Parliament
" for the borough of Whitchurch, in the county
" of Southampton, is in the freeholders only of
" lands, or tenements, in right of themselves, or
" their wives, not split since the act of the seventh [328]
" and eighth years of the reign of King William
" (1)."

In the case of Weymouth and Melcombe *Regis*, evidence having been given, that, from the time of the election previous to that which was then con-

(1) Journ. vol. xvi. p. 52. col. 1.

troverted,

turn to the trustees of the persons who have received the charity.

* Upon this evidence, the counsel for the petitioners contended,

That this charity was in the nature of alms, or parish relief, being substituted instead thereof, to those who are objects of parochial assistance, and distributed by the same persons. That this distinguished it from other charities, which, in different cases, had been determined not to disqualify, and that though *alms* are not mentioned in the last determination of the right of election of Haslemere, they must be considered as working a disqualification by the common law of Parliament. That although there are many determinations of the House respecting particular places, where the disqualification by alms is specially mentioned, we cannot from thence infer, that, with regard to others, where it is not mentioned, it does not operate; for, if this were so, it would certainly have been said in some one instance, in direct terms, that persons receiving alms are not thereby disqualified; but that no such instance is to be found. That the House, in the determinations where alms are

[332]

mentioned, can only be considered to have meant them as declaratory of the general law, for that, upon an examination of many of the cases where such determinations have been made, it will be found, that they were not formed on any evidence of a peculiar usage in the place.

↪ The witnesses swore, that they had never
heard

heard that the receipt of Smith's charity was considered in the borough as a disqualification ; and, on the other hand, they did not remember any instances of persons, whom they knew to have received it, coming to poll.

The counsel for the sitting members insisted, on the first head,

That if a man, at this day, were to purchase, *bonâ fide*, for the purpose of habitation, or any other lawful use, a part of a larger freehold from which such part had never before been divided, it would carry a good vote with it, in this borough. That, if the counsel for the petitioners were right, to the whole extent of their doctrine, every conveyance of such smaller freehold, which had never been a separate estate before 1696, would be void; [333] for, by the statute, the conveyances themselves, which are described in it, not merely the votes, are declared to be void (1).

That, till the statute of the 10th of Queen Anne, cap. 23. which altered the law, in this respect, with regard to freeholds in counties, the statute of King William extended to them ; and that, by necessary inference from the doctrine of the counsel for the petitioners, all conveyances of smaller freeholds carved out of larger, whether in towns or boroughs (where the right of voting is in freeholders), or in counties, from 1695 to 1711,

(1) See the words of the statute cited *supra*, in the Case of Downton, vol. i. p. 217.

must be supposed to have been void. That the law still continues so with regard to boroughs; so that by the statute of William, every proprietor of such larger freehold in a borough would still be tied up from selling part of his estate without the whole.

[334] That this doctrine drew with it such monstrous consequences, that it could not be seriously maintained. That it seemed to have been taken up, upon the idea that this was a burgage tenure borough, where burgages, being indivisible as to the right of voting annexed to them, cannot be split into more votes than they originally bore.

That the two cases of Whitchurch and Weymouth, and the propositions founded upon them, militate against each other; for that the latter proves that the principle of the former is not to be extended to all boroughs; That, with regard to the first, there is none of the evidence, on which the determination was made, stated in the Journals; That, as to the second, it seems from the whole account of it in the Journals (in which account, by the bye, there are a great many inaccuracies), that the resolution of the Committee was formed upon the ground of occasionality in the votes which had been made since 1711; That it only says, that such votes were bad, at the election then under the consideration of the Committee, not that every new vote that should ever be made after 1711 should be so. That, besides, although the general determination of the Committee, as to the persons

[335] entitled

entitled to sit, was agreed to by the House, we are not, therefore, to consider the previous resolution as a resolution of the House; for that, when the House adopts any special resolution of a Committee, it is always *specially* agreed to, which was not done on that occasion.

That even the more moderate part, of what the counsel for the petitioners contended for, could not be admitted, being contrary to the established maxim, that fraud is not to be presumed. That, at the time when many of the conveyances in the present case were made, triennial Parliaments were in use; so that most conveyances of all sorts must, at that period, have been made near the time of an election.

That it was now too late to object to freeholds which had been voted for as separate tenements for 30, 40, 50, or 60 years. (→ This was proved to be the case of many of those which had been objected to). That, if they had been fraudulently conveyed, the time to object to them was when the transaction was recent, and could have been enquired into, which indeed had been attempted in 1751, against many of them, but without success (1). [336]

That the number of inhabitants in Haslemere had increased greatly within this century, which afforded a fair presumption, that the tenements had been divided, for the fair purpose of habita-

(1) *Quere?*

tion. (☞ They gave up some of their votes objected to on this first head).

On the second head, They contended that the borough and manor are co-extensive.

One piece of evidence, to prove this, was, That in the court-rolls, as long as there was a court-baron held at Haslemere, the title was "*Burgus de Haslemere.*"

[337] This, they said, shewed that the borough and manor are the same; for that a court-baron can only belong to a manor, and therefore the title "*Burgus*" could not have been used in the court-rolls of the manor, if the borough had been something different from the manor.

They contended, on the sixth head of objection, that Smith's *charity* is not *alms*; for that by that word the House means only parish relief. That in the case of Cirencester in 1690, the Committee of elections having resolved that a charity called byemoney, exactly analagous to that in question, being distributed by the parish officers, and given to such as do not receive parish relief, disqualified, the House *disagreed* (1). That even parish relief is not a general disqualification, for that there is no instance where the House, in determining the right of election in any particular place, has *expressly* mentioned any *general* disqualification, or said, for instance, infants, women, peers, have no right to vote.

(1) Journ. vol. x. p. 461. col. 1, 2.

The counsel for the fitting members then proceeded to their objections to the voters for the petitioners ; which were as follows :

1. * To some, as having voted for tenements split for election purposes, within the meaning of the statute of King William.

2. To others, as having voted under fraudulent conveyances, having never been in possession, and not having any beneficial interest in their supposed estates.

☞ These two objections went to about 24 votes.

3. To 1, as having received parish relief, (if the Committee should think that a disqualification).

4. Their last objection went to all the other votes for the petitioners, and to some of those objected to under the first head. The facts on which it was founded were these :

The late Mr. Webb, Solicitor to the Treasury, by his last will, bearing date the 6th of February, 1770, devised his estates, real and personal, to his wife, and her heirs, executors, and assigns, but subject to the payment of his debts ; which were considerable, particularly to the Crown. He died soon after,

[339]

On the 6th and 7th of August, 1771, by indentures of lease and release, between Mr. Webb's widow of the one part, Edward Beaver of the other, and Dr. Halifax and Richard Blyke of the third part, after reciting that a marriage was intended between Mrs. Webb and Mr. Beaver,

Mrs. Webb conveyed part of the real and personal estates, to which she was entitled under the will of her late husband, to Halifax and Blyke, and their heirs and assigns, in trust, to pay out of the rents and produce of the real, and the produce of the personal estate, all the debts of the testator, and also six thousand pounds to her intended husband, and, from and after the payment of the debts and the six thousand pounds, upon trust to convey to such uses, as she (notwithstanding her coverture) should appoint, by a deed or will, and, if she should die without making such appointment, to the use of her heirs, executors, and assigns. The marriage took place.

[340] On the 5th and 6th of May, 1774, Halifax and Blyke, in consideration of ten shillings, bargained and sold, to Beaver and his assigns, all the messuages, lands, and tenements, lying within the borough and manor of Haslemere, for life.

Mr. Beaver, by subsequent deeds, but previous to the election, conveyed to the different voters objected to, freehold tenements, for which a nominal consideration in money (specified in the conveyances) was paid.

From the whole of the circumstances just stated, the counsel for the sitting members argued,

That the conveyances by Beaver must be considered as colourable and fraudulent, and that the Committee must set aside the votes given in consequence of them. That the conveyance, by Halifax and Blyke to Beaver, was contrary to, and a breach

breach of, the trust to them. That if the estate which they had granted was good, *in law*, yet, certainly, Beaver only took the bare *legal* estate, subject to the * trusts, of which he had notice by being a party to the first deed, and that he could not, therefore, convey any beneficial interest to the voters.

The counsel on the other side, in their reply, said, on this head,

That, by the conveyance of May, 1774, Beaver clearly took a *legal* estate of freehold, and that the voters, in like manner, by his conveyances to them, took *legal* estates, and acquired *bond fide* freeholds in their tenements; and, therefore, that the right of voting, annexed to those freehold tenements, vested in them.—That the Committee had no jurisdiction similar to that of a court of equity, to investigate the trusts to which the estates of the freeholders might be subject,

On Wednesday, the 12th of April, the Chairman of the Committee acquainted the House, that the Committee had received an application from the petitioners, and sitting members, to desire that the Committee would move the House, for leave to adjourn during the recess at Easter, as such an adjournment would be of great convenience to the parties, in the further hearing of the merits of the cause, and that the Committee were desirous of adjourning for some days during the recess, and had, therefore, directed him to move the House,

[342]

that the said Committee might have leave to adjourn till Friday, the 28th of April.

On this, the House was moved that the act of the 10th of George the Third, cap. 16, should be read, which being accordingly done, it was ordered, "That the said Committee have leave to adjourn till the 28th of April (1)."

On Tuesday, the 9th of May, the Committee, by their Chairman, informed the House, that they had determined,

That the two fitting members were duly elected (2).

(1) Votes, p. 542, 543.

(2) *Ibid.* p. 653.

XXI.

THE

C A S E

Of the COUNTY of

CLACKMANNAN,

In SCOTLAND.

The day appointed for choosing this Committee was Tuesday, the 4th of April (1); but the House not being complete, according to the provisions of the statute (2), they were obliged to adjourn to the day following (3), although very important business was to have come on, after the ballot.

On Wednesday, the 5th of April, the Committee was chosen, and consisted of the following Gentlemen:

Frederick Montagu, Esq. Chairman	
Sir George Saville, Bart. - - -	
Hon. John Vaughan, - - -	
Charles Goring, Esq. - - -	
Lord John Cavendish, - - -	
Thomas Halfey, Esq. - - -	
William Chafin Grove, Esq. - -	
Richard Benyon, Esq. - - -	
Hon. Booth Grey, - - -	
James Grenville, jun. Esq. - -	
Thomas George Skipwith, Esq. -	
Richard Wilbraham Bootle, Esq. -	
Edward Bacon, Esq. - - -	

Members for	Higham Ferrers
	Yorkshire.
	Berwick.
	Shoreham.
	York.
	Hertfordshire.
	Weymouth, &
	Peterborough.
	Leicester.
	Buckingham.
	Warwickshire -
Chester.	
Norwich.	

N O M I N E E S.

Of the Petitioner :
 William Adam, Esq. - - -
Of the Sitting Member :
 Lord Adam Gordon, - - -

Gatton.

Kincardine

P E T I T I O N E R :
 James Francis Erskine, Esq.

Sitting Member :
 Ralph Abercromby, jun. Esq.

C O U N S E L

For the Petitioner :
 Mr. Maddox, Mr. Crosbie.
For the Sitting Member :
 Mr. Rae, Mr. Macdonald.

(1) Votes, 27 March, p. 438.
 (2) *Vide supra*, Introd. sect. 3. No. 11. p. 49. 50.
 (3) Votes, 4 April, p. 485.

THE
C A S E

Of the COUNTY of

CLACKMANNAN.

ON Thursday, the 6th of April, the Committee being met, the petition was read, setting forth ; That the sitting member *was absolutely disqualified and ineligible* ; That the petitioner had a majority of legal votes ; And, that the return of the sitting member was brought about by various illegal and unwarrantable acts and proceedings (1).

The counsel for the petitioner insisted,

That, as the qualification of the sitting member was expressly objected to in the petition, he ought to have given in a *particular* of his estate to the clerk of the House, within 15 days after the petition was read, according to the following standing order : [346]

22 November, 1717. " The person whose qualification is expressly objected to in any petition

(1) Votes, 7 Dec. 1774. p. 42.

" relating

“ relating to his election, shall, within fifteen days
 “ after the petition read, give to the clerk of the
 “ House of Commons a paper, signed by himself,
 “ containing a rental, or particular, of the lands,
 “ tenements, and hereditaments, whereby he makes
 “ out his qualification; of which any person con-
 “ cerned may have a copy (1).”

That there is another standing order (the 4th) of the same date, in the following words :

“ If any sitting member shall think fit to question
 “ the qualification of a petitioner, he shall, within
 “ fifteen days after the petition read, leave notice
 “ thereof in writing, with the clerk of the House
 “ of Commons, and the petitioner shall, in such
 “ case, within fifteen days after such notice, leave
 “ with the said clerk of the House the like account,
 [347] “ being in writing, of his qualification, as is re-
 “ quired from a sitting member (2).”

That in the case of Minehead, 27 Feb. 1728, one of the petitioners having neglected to comply with this last mentioned order, the House ordered the Committee of elections not to proceed upon that part of the petition which concerned him (3) (A). That, as the one standing order is equally binding with the other, they were perhaps entitled to insist, by analogy to that case, that the sitting member in the present instance was to be *presumed* to be disqualified. But they said they waved any

(1) Journ. vol. xviii. p. 629.
 col. 1.

(3) Journ. vol. xxi. p. 66.
 col. 2.

(2) *Ibid.*

advantage of that sort, and only desired that the particular of the estate by which he claimed his qualification, should now be produced to the Committee.

The counsel for the sitting member answered, that, in the first place, the general words in the petition "*absolutely disqualified and ineligible*" were not sufficiently explicit to show that the objection intended to be made, was to the sitting member's estate, which, however, was the only sort of qualification meant by the standing order; that, for aught the sitting member could learn from the petition, the disqualification meant might be something else, as the holding a disabling office, &c. that the agent for the sitting member having served a written notice on the petitioner's agent, on the 22d of March, to know the particular grounds on which the petitioner intended to proceed, no answer in writing had been obtained. (This was proved.) [348]

And, in the second place, they contended that qualifications for Scotland were not within the meaning of the standing order of 1717, as was evident from comparing all the four resolutions of that date together, which by a fifth, extending to them all, are made standing orders. That from this circumstance it was plain, that they were all meant to apply to the same subject. That the first clearly only extended to England, because it refers to the qualification-oath taken at the election for English members of Parliament under the statute of
of

of the 9th of Queen Anne (1). It is in the following words :

Resolved, " That, notwithstanding the oath
" taken by any candidate, at, or after, any election,
" his disqualification may afterwards be examined
" into."

That consequently, the other three, in like manner, only respected England.

As to the requisition now made, of producing the *particular* of the sitting member's estate to the Committee, they said, that, in order to answer it, it would be necessary to state the origin and nature of qualifications in Scotland.

Before the reign of James the First of Scotland, all freeholders, who held of the King in chief, were *entitled* to sit in Parliament, or rather, to speak according to the ideas of those times, they were *bound* to attendance there.

[350] By a statute of the 7th Parliament of that Prince (2), *anno* 1427, the lesser barons and free tenants were *permitted* to send two or more commissioners from each shire, to represent them. Kinrofs and Clackmannan, being very small shires, were only to send one each. When a commissioner was not elected, it continued to be the duty of the lesser barons and free tenants to attend in person.

Still no qualification, farther than being a freeholder, (that is, holding of the King or Prince of Scotland, for such only are called so,) was requisite either in the electors or elected.

(1) Cap. 5.

(2) Cap. 101.

In 1587, in the 11th Parliament of James the Sixth (1), it was enacted, that none should have voice in the election of commissioners, but persons having forty shillings a year in land, and being resident within the shire. But nothing was yet expressly prescribed as a qualification necessary for the elected, except residence.

In 1661, a new statute passed on this subject (2), by which it was provided, that besides all heritors holding a forty shillings land *in capite*, all heritors, life-renters, and wadsetters, holding of the King, and whose yearly rent amounted to ten chalders of victual, or 1000 pounds (Scots), all fee-duties deducted, should be capable of voting, and of *being chosen*. [351]

Twenty years afterwards, the qualification, which is required by law at this day, was established (3), *viz.* That all persons entitled to vote should be publicly infeft in lands, or the superiority of lands (B), holding of the King or Prince, of forty shillings old extent (C), or, where the said extent appears not, in lands liable for the public supplies for 400l. of valued rent distinct from duties (D). Residence was made no longer necessary.

(4) There is no express provision in this last statute with regard to the elected. But it follows

(1) Cap. 114. p. 629. col. 1. (3) *An.* 1681. 3d Parl. of

(2) 1st Parl. of Car. II. Car. II. cap. 2.
cap. 35.

by necessary inference from the tenor of it, that they were to have the same qualification with the electors. By the statute of the 16th of George II: cap. 11. § 10. persons chosen when absent must swear to their having such qualification, before they take their seat.

[352] It was enacted, that, on a certain day (therein specified), all those in every county, qualified as above, should meet at the head borough of their county, and make up a roll containing their names, and the extent or valuation of their estates; and that every year afterwards they should meet, at the Michaelmas head-court, in order to revise the roll, and make such alterations in it, as were necessary, from the changes of circumstances which might have occurred since their last meeting (1).

The same alterations were to be made, if necessary, at the meeting for choosing a commissioner to Parliament, and if any objections were taken to any one's being on the roll, or being excluded from it, either at the Michaelmas, or election-meeting, and were not removed to the satisfaction of the objectors, they were to be stated in an instrument, for the purpose of laying them before the Parliament; or, if no Parliament was sitting, a particular diet was to be appointed, by the meeting, for the court of session to determine summarily upon the matter (2).

[353]

(1) 3 Parl. Car. II. cap. 21.

(2) *Ibid.*

Thus

Thus the law stood with regard to the manner of questioning the qualification of freeholders, till the 16th year of the late King, when a statute passed, containing a great many new regulations, concerning elections, both for the counties and boroughs of Scotland.

One of the provisions of that statute was as follows :

“ If any person shall be inrolled, whose title
 “ shall be thought liable to objection, it shall and
 “ may be lawful for any freeholder standing upon
 “ the roll (whether such freeholder was present at
 “ the meeting, or not), who apprehends that such
 “ person had not a right to be inrolled,* to apply
 “ by *complaint* to the court of session, so as such
 “ application be made within *four kalendar months*
 “ after such inrolment; and the said court, after
 “ service of such complaint, on thirty days notice,
 “ [now reduced to 15 days, by 14 Geo. III. c. 81. [354]
 “ §. 1.] upon the person said to be wrongfully ad-
 “ mitted to the roll, shall, [in a summary way,
 “ proceed to] hear and determine [on such com-
 “ plaint] and if no such complaint shall be exhi-
 “ bited within the time aforesaid, the freeholder
 “ inrolled shall stand and continue upon the roll
 “ until an alteration of his circumstances be al-
 “ lowed by the freeholders at a subsequent Mi-

[* And by necessary impli- a person has not a right to be
 cation held competent, it is to continued on the roll.]
 object, under this clause, that

“ chaelmas meeting, or meeting for election, as a
 “ sufficient cause for striking, or leaving him out
 “ of the roll (1).”

The following facts were proved, or admitted.

Mr. Abercromby has stood on the freeholders' roll of Clackmannanshire, ever since the Michaelmas head-court in 1759. At the meeting for the last election, the petitioner objected to him, on the ground of an alteration of circumstances; but the objection was then over-ruled. Four months had elapsed since that time before this Committee was chosen, and no complaint had been made to the court of session.

[355] The counsel for the sitting member argued, That now all the qualification necessary to be produced by him was his name on the roll; That either the House of Commons, since the 16th of George the Second, had no jurisdiction with regard to the right of freeholders to stand on the roll, because the complaint allowed by the statute is only directed to be made to the court of session, or that, at least, they are bound by the limitation in the statute; and as no complaint had been lodged, within four months after the meeting for election, it was no longer competent to any jurisdiction whatever, to entertain any enquiry on the subject. That the limitation was established to quiet men in the possession of their rights, and to put a stop to the perpetual disputes, which elections formerly used to

(1) 16 Geo. II. cap. 11. §. 4.

occasion in Scotland. That this end could not be answered, if it were considered as not extending to the House of Commons. That, by the same statute (1), all *complaints* of the election of annual magistrates in Scotland are limited to two months;* [356] and that although there is no *express* limitation as to common law actions of reduction in such cases, yet the House of Lords in a very late instance, had determined that the limitation did extend to them, upon the ground that the meaning of the legislature was to draw a line, beyond which litigation should not be carried, in any mode or form (2). That the House of Commons has recognized the necessity of such limitations by adhering so strictly to those which it has established itself, that at the beginning of this session a petition complaining of an undue election having been delivered to the clerk of the House, on the evening of the last day of the fortnight allowed for that purpose, but *after the House was up*, they would not allow it to be

(1) § 24.

[* The reason given for the limitation being two months as to boroughs, and four months in the case of counties, is, that the annual elections of borough magistrates take place about Michaelmas, and that the Court of Session is almost always sitting within two months of that time, (though it is not universally so, *Vide Wight*, p. 326, and the

Case of *Ramsay v. Martin*, Dom. Proc. 7 Feb. 1766, there cited); whereas an election meeting for a county may happen during the summer vacation, when there may be an interval of more than two months before the sitting of the Court.]

(2) Case of *Young* and others against *Johnson* and others.

presented the next day; although there were very particular circumstances attending the case, which, if it had ever been proper to break through* the rule, would have justified it on that occasion (1).

On the part of the petitioner, it was contended,

That the jurisdiction of the House of Commons could not be taken away by the Act of George the Second, it being an established maxim of law, that a new jurisdiction given to any court cannot, by implication, take away the jurisdiction, which a superior court possessed before in the same cases; That the petition to the House of Commons had been presented within the time limited by the statute, if that limitation should be thought to extend to their concurrent jurisdiction; And that, if the petition was presented in time, it surely could not be necessary, that a complaint should also be lodged with the court of session, in order to enable the Committee to proceed in the cause.

[358] That, on the contrary, it seemed more consistent with the privileges of the House, to apply directly to them, when sitting, and more agreeable to the spirit of the act of 1681; for that, according to that act, no complaint could be made to the court of session except in the recess of Parliament.

The Committee, after deliberation among themselves, informed the counsel, that they were of opinion,

(1) *Vide supra*, vol. i. Introduct. Note (O) p. 84, 85.

That

That they were bound by the statute of the 16th of George the Second ; that the inrolment of the fitting member, under all the circumstances of the case, was a sufficient answer to the petitioner's demand of his qualification ; and that no other evidence should be called on the head of his qualification (E.)

The Committee having decided this point, the petitioner informed them, that he would not give them any farther trouble ; and, on Friday, the 7th of April, the Committee, by their Chairman, informed the House, that they had determined,

That the fitting member was duly elected (1).

(1) Votes, p. 504.

N O T E S

ON THE CASE OF

C L A C K M A N N A N.

Note
(A.)

PAGE 347, (A.) Before the standing orders of 1717, there was a resolution of the House of 23 March, 1714, nearly to the same purpose with the fourth of those orders; and in the case of Honiton, 3 May, 1715, the petitioner not having given in his qualification after a requisition of the sitting member, the Committee of elections was discharged from proceeding on his petition. Journ. vol. xviii. p. 71. col. 1, 2.

[360]

P. 351. (B). A *superiority* is the bare seignory of land, independent of the usufructuary interest, or beneficial property in that land. A superior, who has not the beneficial property, is the mesne lord, between the King and the tenant, or actual proprietor. The rent-service, or quit-rent, accruing to the superior, is a mere trifle, and is, I believe, seldom required of the landholder. As a superiority of a forty-shilling land, or of land of four hundred pounds valued rent, without any substantial property in such land, entitles a man to vote, a person who has a large estate, by dividing it into superiorities of that sort, and granting them for life among his friends, may make as many votes as the

the number of forty-shilling lands, or the amount of the valued rent of the whole, will bear; and this practice has become so common in Scotland, that, in most counties, two or three proprietors (generally Peers), are, in effect, the electors of the representative in the House of Commons. A plan for altering this part of the law of Scotland is now in agitation.*

Note
(B.)

P. 351. (C.) The *old extent* is a valuation of the lands in Scotland, supposed to have been made in the reign of Alexander the Third, in order to ascertain the proportion the different proprietors were to pay, of a subsidy raised for his daughter's portion, on her marriage with the King of Norway. When a man can shew that his lands were computed at forty shillings in this old valuation, he is entitled to be put on the roll, whether they amount to four hundred pounds valued rent, or not. But as, by the statute of the 16th of George the Second, cap. 11. § 8. no other evidence of *old extent* can be admitted, but a *retour* of the land prior to the 16th of September, 1681, the most general and easiest method of making out a qualification is by what is called the valued rent.—A *retour* is a verdict of a sort of jury, who are appointed to enquire into an heir's title to succeed to the estate of his ancestor.

Note
(C.)

Ibid. (D.) The *valued rent* is a valuation of the lands in the different counties in Scotland, made in the time of the Commonwealth, and adopted after the Restoration. See

Note
(D.)

[* A law for that purpose was afterwards introduced into the House of Commons, but not proceeded in. The weight, however, of Lord Thurlow's authority, and his arguments in delivering his

opinion, in two cases, of which a very clear account is given in 2 Lud. p. 371, have very nearly put an end to mere fictitious superiorities in Scotland.]

Note
(D.)

the nature of this, and of the old extent, explained at large in Mr. Wight's book on the law of Scotch elections, from page 149 to page 193. By the 16th of George the Second, cap. 11. § 19. two hundred pounds of valued rent is a sufficient qualification in the shire of Sutherland.

Note
(E.)

P. 358. (E.) The counsel for the respective parties in this cause seemed so little aware of the ground which their opponents meant to take, and this produced such a want of precision in the arguments, that it is not surprising that the opinion of the Committee, considered as a *legal* decision, should not have given entire satisfaction even to many persons unconnected with the parties, which certainly was the case. When the Committee first withdrew (for they sat in the court of Chancery, and retired to deliberate into the inner chamber belonging to that court), the counsel for the petitioner thought they were only gone to decide, whether the sitting member should be obliged to produce the particular of his qualification, or they should be put to shew that the circumstances of his estate had undergone an alteration since his first enrolment. Finding that the Committee had resolved, that no evidence on that subject should be gone into, they considered this as a surprize upon them; and a sort of conversation ensued, about the effect of the limitation in the statute, which they had scarcely spoken to before. On this, the Committee withdrew again; but on their return, declared that they adhered to their former opinion.

[362]

When, in that opinion, they said, that they thought themselves bound by the statute of George the Second, they could not mean, that since that statute, the House of Commons can in no case enquire into a person's right to be on the freeholder's roll. The principle cannot be controverted, that an affirmative statute, giving a jurisdiction in certain cases to a court which had it not before, does not take away the old jurisdiction of another court in those cases.

Neither

Neither could the Committee mean, that they were so bound by the statute, that they could not entertain a complaint of a person's being on the roll, unless such complaint were made to the House (by petition) within four months. That proposition did not apply to the case before them, as the petition had been presented within less than two months of the meeting for the election.

The Committee therefore meant, that they could not enquire into the right of a person to be on the roll, although a complaint were made to the House within the four months, unless a complaint were also made to the court of session within that time. But surely, as the jurisdiction of the House is concurrent with, not appellant from, that of the court of session, there can be no necessary dependency or connection between a complaint to the one, and to the other. Observe the consequence of such a doctrine. We will suppose the Parliament to meet for the dispatch of business (when the common order for presenting petitions within a fortnight, is always made) a month after the election. If the day for hearing a petition, the ground of which is a complaint of a person's standing improperly on the freeholder's roll, happen to be fixed at any time within four months of the election (suppose within six weeks), you will, in such case, be precluded from proceeding on your petition, unless you make your complaint to the court of session in less than six weeks, although the statute positively gives you four months time for that purpose.

[363]

✎ The fourth section of the statute of George the Second, on which this cause was decided, is very inaccurately penned (1).

1. It makes no direct provision for a case like the present, where the objection has been *first made at the meeting of freeholders, and over-ruled by them*, with regard to an application to the court of session; and accordingly it has been

(1) *Vide supra*, p. 353, 354.

Note
(E.)

made a question, whether a complaint to the court of session be competent * in such case. But it has been determined that it is, 11 Feb. 1768; Sir John Gordon against William Pulteney, Esq. and in the case of Sir George Suttie. Wight, p. 122.

2. There are no express words giving leave to complain at all to the *court of session* (after a man has once been admitted on the roll, and has stood there for the necessary time not objected to, or objected to, without success), upon an objection taken on account of a subsequent change of circumstances. The meaning of the legislature certainly was, that such complaint should, in that case, be competent; and that it should only be so within four months after the first Michaelmas or election-meeting subsequent to the alteration of circumstances; and so it seems to have been understood by the court of session. *Vide* Wight, p. 268.

[3. *Vide* the point argued in the case of *Fife, infra*, vol. iv. p. 222.]

XXII.

THE

C A S E

Of the COUNTY of

L A N E R K,

In SCOTLAND.

The Committee was chosen on Friday the 7th of April,
and consisted of the following Gentlemen :

Lord John Cavendish, Chairman	-	} Members for	York.
Thomas Frankland, Esq.	- - -		Thirsk.
Sir Roger Mostyn, Bart.	- - -		Flintshire.
Charles Penruddocke, Esq.	- - -		Wiltshire.
Edward Southwell, Esq.	- - -		Gloucestersh.
Sir Thomas Clavering, Bart.	- - -		Durham county.
Marquis of Granby,	- - - -		Cambridge Un.
John Orde, Esq.	- - - -		Midhurst.
Lord Mountstuart,	- - - -		Bossiney.
John Scudamore, Esq.	- - - -		Hereford.
John Mayor, Esq.	- - - -		Abingdon.
Sir Simeon Stuart, Bart.	- - -		Hampshire.
Viscount Lisburne,	- - - -		Cardiganshire.
NOMINEES:			
<i>Of the Petitioner,</i>			
Lord Advocate of Scotland	- -		Peeblesshire.
<i>Of the Sitting Member,</i>			
Solicitor General of Scotland	- -		Edinburghsh.

PETITIONER:
Daniel Campbell, Esq.,

Sitting Member :
Andrew Stuart, Esq.

COUNSEL:
For the Petitioner,
Mr. Macdonald, Mr. Elliot.

For the Sitting Member,
Mr. Maddox, Mr. Hardinge.

THE
C A S E

Of the COUNTY of

L A N E R K.

ON Saturday, the 8th of April, the Committee being met, the petition was read, the allegations of which were;

That Mr. Stuart, at the time of the election, was ineligible; and

That the petitioner had the majority of legal votes, and was duly elected (1).

The counsel for the petitioner opened the cause by stating that Mr. Stuart, at the time of the election, held the office of joint King's remembrancer in the court of Exchequer in Scotland, which they said was an office of profit under the Crown, created or erected since the 25th of October, 1705, and, therefore, disqualified the holder of it from being elected a member of the House of Commons, in

(1) Votes, 7 Dec. 1774- p. 42.

consequence

consequence of the provisions of the statute of the 6th of Queen Anne, cap. 7. sect. 25 (1).

The counsel for Mr. Stuart denied that the office of King's remembrancer was within the meaning of that statute, but, at the same time, alleged, that Mr. Stuart did not hold the office at the time of his election.

[369] Upon this, on the part of the petitioner, a copy (which was admitted to be authentic) of the King's commission, under the union seal, bearing date the 25th of January, 1771, and granting to Mr. Stuart, and Patrick Warrender, Esq. and to the survivor, the joint office of King's Remembrancer, for life, was produced; and this being *prima facie* evidence that Mr. Stuart was possessed of the office, his counsel were put upon proving, that, since the date of the commission, and before the election, he had divested himself of it. To show this (2), they called Mr. Cooper, secretary to the treasury, Mr. Solicitor General, and Mr. Henry Drummond, banker.

Mr. Cooper said, That on the 25th of October, 1774, or the day before, the Solicitor General told him, he had received from Mr. Stuart, a paper, importing, to be a resignation of his office, and that

(1) See the Case of North Berwick, &c. *infra*, for the words of the statute. Stuart was, or was not possessed of the office at the time of the election, should be enquired

(2) It was agreed by the counsel and the Committee, into, and determined separately, *Vide* vol. i. p. 63. that the question whether Mr.

he had desired him to deliver it to him (Mr. Cooper), to Mr. Robinson the other secretary, or to the first Lord of the treasury. That he received this paper on the 25th of October, either inclosed in a blank cover, or with a mere letter of transmissiion, he did not recollect which. That when he received it, he endorsed it thus : "Received October 25th, G. C." That, on the same day, or the day following, he informed Lord North of it, who desired him to keep it; and that it had been in his custody ever since. [370] That it had never been laid before the board; and that he did not know that the King had ever been informed of it. That it came directed to him at the Treasury-chambers.

That in January, or February, application was made, on the part of Mr. Stuart, for a new commission to be made out to somebody else; that he, at that time, had received orders to have such a commission made out, and that the only reason for its not being done was, that nobody could be found to accept of it (as a great part of the profits being paid to the gentleman who formerly held the office); and because the other joint-remembrancer's consent had not been obtained. That he (Mr. Cooper) has been ten years in his present employment. That the official course is to present resignations to the first Lord, and receive his commands concerning them. That in his time, however, he did not recollect any resignation of this sort, but one of Mr. Owen, which was kept in the same manner this had been. That he did not remember
any

any resignations, which, after they had been delivered to him, had failed of taking effect.

The deed of resignation being produced, and read, it appeared to be an instrument, importing Mr. Stuart's desire to resign the office, or all his share and interest in it, and that he accordingly thereby resigned it, into the hands of the King, or of the officers, or commissioners, empowered to receive the same. It was signed and sealed by Mr. Stuart, in the presence of two subscribing witnesses; and bears date at Edinburgh, the 18th of October.

The election was holden on the 28th of October.

[372] Mr. Solicitor General said, That he had received the instrument of resignation from Mr. Drummond, by a servant, on the 22d of October, with a letter from Mr. Stuart, desiring him to deliver it to Mr. Cooper, Mr. Robinson, or Lord North. That it went from him to Mr. Cooper, on the Tuesday following, but he did not recollect whether he delivered it to him himself, or sent it. Being asked if Mr. Stuart's letter contained any farther directions than what he had just mentioned, he said, That he understood it to be Mr. Stuart's desire that he should deliver the resignation, in order to put on end to the objection to his eligibility. That, however, in the opinion he had of the objection, he should have exercised his discretion on the subject of Mr. Stuart's directions; but that, knowing it to be a losing office in the hands of Mr. Stuart, he had advised him to get rid of it three months before;

fore ; and that he had delivered it to Mr. Cooper as a *bonâ fide* resignation.

Mr. Drummond produced the letters, which passed between him and the Solicitor General, relating to the deed of resignation. They contained nothing more than what had already appeared. He said, That, by Mr. Stuart's letter to him, he was desired, if the Solicitor General should happen not to be in, or near, London, to deliver the resignation himself to Lord North, or to one of the secretaries of the treasury. That he had destroyed Mr. Stuart's letter which accompanied the resignation, and that he did not recollect whether he was directed by it to desire Mr. Cooper, Mr. Robinson, or Lord North, to present the resignation to the board.

[373]

The counsel for the sitting member then called Mr. Davidson and Mr. Dagge, solicitors, to give an account of what passed in the House, in the case of Mr. Maitland, 6 Feb. 174⁵.

The following is what appears in the Journals relating to that case :

6 December, 1748. " A petition of David
" Scot, Esquire, was presented to the House, and
" read ; setting forth, That at the election of a
" burghs to serve in Parliament for the burghs of
" Aberbrothock, Aberdeen, Inverbervie, Montrose,
" and Brichen, upon the 13th day of June,
" 1748, the petitioner, and Charles Maitland, Advocate,
" then and long after sheriff depute of the
" shire of Edinburgh, appeared as candidates :

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X

" That

“ That by an act, made in the 21st year of his
 “ present * Majesty (1), (intituled, &c.) it is, among
 “ other things, enacted, “ That no sheriff depute,
 “ in any shire in Scotland, shall be capable of
 “ being elected, or of fitting or voting as a mem-
 “ ber of the House of Commons.” “ That not-
 “ withstanding the said Charles Maitland, as a
 “ commissioner for the burgh of Inverbervie, did
 “ give his vote, at the said election, for himself,
 “ to be member for the said district of burghs, and
 “ did induce two other commissioners also to give
 “ their votes for him, and did obtain a return from
 “ the sheriff of Forfar of himself, as the burgeses
 “ elected for the said district; that the commis-
 “ sioners for the burgh of Aberbrothock, the pre-
 “ siding burgh [and] Brichen, gave their votes for
 “ the petitioner. Wherefore the petitioner appre-
 “ hends, that he was duly elected, and ought to
 “ have been returned, as the said Charles Mait-
 “ land was by law incapable of being elected, as
 “ his incapacity was then objected, and was noto-
 [375] “ rious to all the electors, and, in particular, well
 “ known to the said Charles Maitland himself:
 “ Praying therefore, &c. (2).” The cause was
 appointed to be heard at the bar of the House.

2 February, 174⁸, “ the standing order of 173⁵
 “ being read; and an extract of the minutes of the
 “ election produced; and an extract of the pro-

(1) 21 Geo. II. cap. 19.

(2) Journ. vol. xxv. p. 667. col. 1, 2.

“ceedings of the sheriff’s court of Edinburgh touching the admission of Maitland, as sheriff depute, and of Mr. James Levingston (the sheriff substitute); and a copy of the protests taken by Mr. Charles Maitland on his demission of the office of sheriff depute of Mid Lothian; and the counsel for the petitioner having gone through their evidence; the counsel for the sitting member was heard, and then the farther hearing was adjourned to the 6th (1).”

On the 6th of February Mr. Scot withdrew his petition (2).

Mr. Davidson said, That, at that time, he was clerk to Mr. Ross, agent for Scot. That he attended the whole course of the business. That Mr. Maitland had executed a *demission* (which is a term of the Scotch law equivalent to “*resignation*”) 10 days before the election, and transmitted it by post to the Duke of Newcastle; but it had not been accepted (3). That the argument of Mr. Joddrel, counsel for Mr. Maitland, was entirely grounded on the injustice of considering a man as disqualified, who, before the election, had done all in his power to divest himself of an incapacitating office. That it was understood that this argument turned the opinion of the House, which, before that, had been in favour of Scot; and that he (Scot) withdrew his petition on that account:

[376]

(1) Journ. vol. xxv. p. 710.
col. 1.

(2) Same vol. p. 713. col. 2.

(3) *Quære?*

that he never heard there had been any compromise between Maitland and Scot.

[377] Mr. Dagge said, That he was clerk to Philip Carteret Webb, agent for Maitland, but that he knew nothing of the cause, but what he had found on the brief for Maitland. This brief was offered to be given in evidence, but, being objected to, was not admitted. It was also said, on the part of the petitioner, that Mr. Davidson's account of Joddrel's argument, and of the conjectures about the opinion of the House, was not evidence, and ought not to have been heard.

It was *suggested*, by the counsel for Mr. Stuart, that Mr. Campbell had prevented a new commission from issuing by writing a letter to Sir Patrick Warrender, desiring him to oppose it. But his counsel asserting that he had only written to him, to enquire whether his consent had been given, there was no evidence produced on that subject.

On the part of Mr. Campbell, Mr. Royer, a clerk of the treasury, and Mr. Walker, an attorney in the remembrancer's office in Scotland, were called.

[378] Mr. Royer said, That, by his office, he had the custody of the last quarterly establishment of the court of Exchequer in Scotland, *i. e.* the state of the quarter's salaries of the different officers belonging to the court. He then produced the book, and read, from an entry of that establishment, the following words: " 5 Jan. 1775. To Andrew Stuart, Esquire, 62l. 10s. To Sir Patrick Warrender,

“ Warrender, 62l. 10s.” He said, That such an establishment is transmitted four times a year, by the Barons of the Exchequer in Scotland, to an officer of the treasury in London, in order to receive the approbation of three Lords of the treasury, which they signify in these words: “ We do hereby sign our approbation, and return it to you, that you may direct payment.” That the last establishment, of 5 January, was approved of in this form, and signed “ Charles Townshend, “ Beauchamp, Charles Wolfran Cornwall,” and was transmitted to Scotland. He then read the last entry of an allowance of the salary to Mr. Stuart, as sole remembrancer, which bore date the 5th of January, 1771. (Mr. Stuart before Mr. Warrender, now Sir Patrick, was joined with him, held the office solely, and resigned previous to the making out of their joint commission.) He said he knew nothing concerning Mr. Stuart’s former [379] commission, the circumstances of the resignation of it, or of the acceptance of that resignation. That they were not in his department, but that a warrant for making out a new commission must come to him, and that such warrant is signed by the King’s sign manual, and countersigned by three Lords of the treasury.

Mr. Walker said, That process has issued from the remembrancer’s office in the names of Stuart and Warrender, without variation, since their joint appointment; and did so in the last term, which was in February, 1775. That, when a new re-

membrancer is appointed; there is an order of the court to the clerks, to use his name, as soon as his commission takes effect. That, in 1768, such an order was made for using the name of Sir Hugh Dalrymple, then appointed to the office, and a similar order when the sitting member was appointed to the office solely, and another when he and Warrender were jointly appointed. That the [380] office is executed by a deputy. That he did not know by whom the deputy is appointed.

The counsel for the petitioners then read part of the recital of the joint commission to Stuart and Warrender, viz.

“ Et quandoquidem nostram permissionem supplicavit, dictum officium resignare, nobis gratiose placuit assensum dare cum, & concedere idem, modo postea mentionat. Igitur regia nostra voluntas & bene placitum est, literas patentes revocare, per quas dictus Andreas Stuart constitutus fuit ad dictum officium; & dare & concedere, &c.”

COUNSEL for the Sitting Member.

Eligibility, of common right, is to be favoured, and all disabilities operating on antecedent rights to be construed strictly. The party therefore who is to be disabled by any disqualifying statute, must come, to a degree of accuracy, within the description of the statute. Evidence that the instrument of resignation was lodged with Mr. Cooper does not, indeed, prove that it was accepted, for to establish that, it must be traced personally to the King,

King. But Mr. Stuart did what was in his power, to remove the supposed incapacity. If he had been entirely wrong in the mode of communicating his resignation, or if accidental delay had retarded its arrival, even that ought not to frustrate his *bonâ fide* intention to get free of the office. If the minister by delaying, or absolutely refusing, to accept a resignation, could continue a disability, it would be in his power to preclude all men who once have been possessed of disqualifying offices, from ever being chosen members of Parliament; and, as it appeared in a late instance (1), that he can, by a sort of *ne exeat*, prevent a man from getting out, once he is a member of the House, he would also be able, by a sort of *ne intret*, to prevent one in Mr. Stuart's situation from getting into it.

To render the resignation of a person holding the share of a joint office valid, the assent of the other person who is joined in the office is not necessary. [382]
What may be the effect as to the share not resigned, is no part of the present question.

A Committee, when they enquire into a point of fact, is, in every respect, to be considered as a jury, and (as a jury) may decide such a point on

(1) This refers to Mr. Bayly's having been refused the stewardship of the Chiltern Hundreds, which he asked for, in order to vacate his seat for Westbury, when the election for Abingdon was determined to be void. *Supra*, vol. i. p. 447.

circumstances which come within the knowledge of any of themselves, although not proved by the evidence given before them. One of the gentlemen on the present Committee is conceived to be well acquainted with the history of what passed in the case of Scot and Maitland, and, if so, he knows (whether Mr. Davidson's account be legal evidence or not) the circumstances to have been as Mr. Davidson has stated them, and, therefore, although there was no actual resolution, the Committee will consider the event of that cause as tantamount to a determination, in favour of Mr. Maitland, on the same ground on which the fitting member's eligibility stands in the present case.

[383]

COUNSEL *for the Petitioner.*

With regard to all offices of trust, whether on a great or small scale, it is a clear principle of law, that there must be a proper understanding between the *employer* and *employed*, before the relation can be dissolved. This was not the case with Mr. Stuart's resignation, at the time of the election. The relation between him and the King was not understood to be at an end, either by the Treasury here, or the court of Exchequer in Scotland. Long after the election, the latter stated him to be joint-remembrancer, in the establishment transmitted to England; and process continued to issue in his name, and the Lords of the Treasury made out their warrant for him to receive a quarter's salary,

lary, which has either been paid, or is certainly payable to his order.

Another principle of law is, that all surrenders, or resignations, of grants of offices under the Crown, must be made with the same solemnity with which the grants were made. The holder of such an office cannot completely divest himself of it, except the resignation be made into the hands of those who by law are to receive it, when acting in their official capacity, and not until the King signify, by matter of record, his acceptance of it. This is proved by a great variety of cases in the law books. Brooke's Abr. Title *Surrender, Placit.* 18. 9 Edw. IV. 7. Dyer 176, 194. b. 335. Br. Abr. fol. 205. Jenkins 123. *Placit.* 50. Plowden 105. Bacon's Abr. Title *Office and Officers*, p. 743. [384]

Those, indeed, are cases which happened in England; but they will be found to apply to the present case, when it is considered that Mr. Stuart's office belongs to a court, constituted according to the model of the court of Exchequer in this country, and governed, in its proceedings, by the law of England.

But, independent of those authorities, the tenor of Mr. Stuart's own commission, and of all the previous commissions to this office (some of which were given in evidence), shews, that the office is not divested out of the former holder, upon a resignation, until the new commission is granted. If the commission to Mr. Stuart is attended to, it

(1) it will appear that it consists of two parts; the first, a formal acceptance, by the King, of the resignation of the sole office which he formerly held, and a consequent revocation of the letters patent; and the other, the new grant of the office. On the present occasion, no such acceptance or revocation can be shown.

If, indeed, it should appear, in any case, that the officer wishing to resign an incapacitating office, had done all in his power for that purpose, and that the Crown had, in order to continue his incapacity, refused to complete his act, the House of Commons might, perhaps, on general principles, think themselves entitled to frustrate an abuse of the *power* of the Crown exercised in one way, and sheltered under an act of Parliament, whose object was to restrain its *influence* exercised in another way. Even this would be going a great way, for it is a *voluntary* act where a person disqualifies himself by accepting of an incapacitating office, and, as he
 [386] accepts of it with his eyes open as to the consequences, he consents to the disability, until he can, in the regular way, divest himself again of the office. The words of the statute of Queen Anne are positive. "No person who shall *have* any new " office, &c. shall be capable of being elected (2)"; and, till a man has, in a legal manner, got rid of an office, to which a trust and duties are annexed, he certainly is answerable for the performance of the

(1) *Supra*, p. 380.

(2) 6 Ann, cap. 7, § 25.

trust and duties, and, in every legal sense, *has* the office.

But in the present case, there is no pretence of any injurious refusal by the Crown. It appears that Mr. Stuart gave no directions for presenting his resignation to the persons who by law were to receive it. A Secretary of the treasury, or the First Lord, in his private capacity, although they might be the proper channels for conveying it to the board, were, neither of them, the proper officers to receive it. While it continued in their hands, unaccepted, it was the same thing as if it had still remained with Mr. Stuart himself; and he does not appear to have shown the smallest impatience, or desire to hasten the acceptance, or the revocation of his commission. [387]

If the case of Scot and Maitland were exactly parallel to the present, the sitting member could derive no advantage from it, because there was no determination. The counsel on the other side do not pretend to say that the Committee ought to pay attention to the *recollection* of an agent, at the distance of twenty years, of what people out of doors *imagined* the House *thought* in consequence of a speech from a gentleman at the bar; and no gentleman on the Committee, who may have been a member of the House at that time, will take upon him to say, what were the sentiments of the majority of the House, on a question which never came to a decision.

The Committee, after having withdrawn (1), and

(1) They sat in the Court of Chancery.
deliberated

deliberated about two hours, directed their Chairman to inform the Counsel, that they had come to the following resolution :

Resolved, " That it is the opinion of the Committee, that Andrew Stuart, Esq; by the instrument of resignation executed at Edinburgh, on the 18th of October, 1774, and delivered to Mr. Cooper on the 25th of the same month, was, at the time of his election, divested of the office of King's remembrancer in the court of Exchequer in Scotland."

This resolution, of course, put an end to the cause.

On Monday the 10th of April, the Committee, by their Chairman, informed the House, that they had determined,

That the fitting member was duly elected (1).

(1) Votes, p. 516.

XXIII.

THE

C A S E

Of the BOROUGH of

ST I V E S,

In the County of CORNWALL.

The Committee was chosen on Friday, the 28th of April,
and consisted of the following Gentlemen:

Henry Herbert, Esq; Chairman	-	Members for	Wilton.
Sir William Guise, Bart.	- - -		Gloucestershire.
Philip Yorke, Esq.	- - - -		Helleston.
George Finch Hatton, Esq.	- -		Rocheſter.
Hon. Nathaniel Curzon,	- - -		Derbyſhire.
Staats Long Morris, Esq.	- -		Banff, &c.
John Adams, Esq.	- - - -		Carmarthen.
Sir Henry Gough, Bart.	- - -		Bramber.
Sir William Wake, Bart.	- -		Bedford.
Joſeph Martin, Esq.	- - - -		Tewkeſbury:
Marquis of Granby,	- - - -		Cambr. Univer.
Joſhua Mauger, Esq.	- - - -		Poole.
Sir Philip Jennings Clerke, Bart.			Totneſs.
NOMINEES :			
Lord John Cavendiſh,	- - -		York.
Abel Moyſey, Esq.	- - - -		Bath.

PETITIONERS:

Samuel Stephens, Esq.

Several Inhabitants, Electors of the borough of St. Ives.

Sitting Members:

William Praed, Esq. Adam Drummond, Esq.

COUNSEL:

For the Petitioners,

Mr. Mansfield. Mr. Buller.

For Mr. Praed,

Mr. Lee, Mr. Elliot.

For Mr. Drummond,

Mr. Macdonald.

THE
C A S E
Of the BOROUGH of
ST I V E S.

ON Saturday, the 29th of April, the Committee being met, the two petitions were read, setting forth; That at the last election, when the two sitting members, and Arthur Holdsworth, Esq; and Mr. Stephens, the petitioner, were candidates, the two sitting members, and Mr. Praed's father, by themselves and their agents, previous to, and during, the election, did give and lend several large sums of money to several of the electors, in order to corrupt and to procure them to vote for them (the two sitting members); That they by other ways and means were guilty of bribery; that the returning officer had acted partially, by admitting persons to vote who had no right, and rejecting others who had a right; and that, by these, and other undue

due means, the fitting members had obtained a majority on the poll, and were returned (1).

The last determination of the right of election in this borough was then read, and is as follows :

8 December, 1702. Resolved, "That the right of election of burgessees to serve in Parliament for the borough of St. Ives, in the county of Cornwall, is in the inhabitants of the said borough, paying scot and lot (2)."

Then the standing order of 173 $\frac{1}{2}$ was read. (3).

The numbers on the poll, as produced by the town clerk, were as follows:

For Praed	-	-	-	95
For Drummond	-	-	-	78
For Stephens	-	-	-	71

[393] The evidence produced on the part of the petitioner tended to show that certain sums of money, which were proved to have been advanced by Mr. Praed, the father, to the voters, for which he took their notes, payable with interest, to the bank of Truro, were only colourable loans; that, when the voters received the money, there was a condition annexed that they should vote for his son and a friend; that they were given to understand that if they complied with this condition, the money would never be demanded of them: and that Mr. Praed

(1) Votes, 7 Dec. 1774. p. 43, 44.

(2) Journ. vol. xiv. p. 74. col. 2.

(3) *Supra*, vol. i. p. 99.

the father was to be considered as the agent for his son, and for Mr. Drummond, having, by canvassing with Mr. Drummond, shown that *he* was the friend meant. That Mr. Praed and Mr. Drummond were, therefore, incapable of sitting for the borough.

That so many of the voters for the sitting members had been bribed that, when they were struck off the poll, the majority must remain with Mr. Stephens, and he be entitled to be declared duly elected.

They likewise proposed to add about 40 to the poll, in favour of Mr. Stephens, by proving, that, though they had not been rated, and had not paid, they possessed rateable property, and ought to have been rated, and were, therefore, entitled to vote. [394]

The counsel for the sitting members objected to any evidence being given on this head.

They said they were ready to prove, that all the persons who had been rated in St. Ives for the last five years, were so on the last occasion of making the rate, except two, who had been struck off because they had applied, on account of the narrowness of their circumstances, to be relieved from the land and window tax. That none of the persons in question, except two, had appealed against the rate made in Jan. 1774; and that, on *their* appeal, the rate was confirmed. That the determination in the case of Milborne Port, (which Mr. Stephens's counsel quoted as in his favour) was, that when a man has been *de facto*, rated, and is possessed of rateable

property, and has paid the rate, such person is within the description of one paying scot and lot, although the overseers who made the rate, may have been illegally * appointed (1). But that it never had been pretended before, that men under circumstances like those of the persons now proposed to be added to the poll, could vote as scot and lot men. That the Committee would not transform themselves into overseers of the poor, and make a new rate for the borough of St. Ives. That the parish officers have, in that respect, a discretionary power, which even the court of King's Bench would not controul, unless on the ground of gross misconduct and partiality.

The counsel for the petitioners answered, that some of the persons in question could be shown to have applied to be rated, and had been refused, so that they did not acquiesce in what the overseers had done. That they did not appeal, knowing it would be in vain, for that it could also be shown that the four Justices, who appointed the overseers, were all in the interest of the Praeds. That the sitting member himself was one of the four, and that the appeal which had been brought was only colourable, and made by two of Praed's partizans, for the purpose of taking advantage of it on the present occasion.

The Committee asked if they meant to bring

(1) *Vide* the resolution of the Committee in that case, *supra*, vol. i. p. 129.

evidence, to prove misconduct or criminal partiality in the overseers, with regard to the leaving any of the persons in question out of the rate; which they said they did not; on which the Committee declared by their Chairman, that they were of opinion,

That persons, though possessed of rateable property, if they have not been rated, and cannot prove misconduct in the overseers in not rating them, are not entitled to vote (A).

The counsel for the sitting members brought witnesses to prove that the petitioner had endeavoured to procure himself to be elected, by giving or promising money to the voters.

I have not attempted to state the evidence produced to establish the bribery, for reasons which have been given in several of the foregoing parts of this work, and particularly in the case of Shaftesbury (B.)

In the course of the evidence, one Wallis was called, to prove that one Noell said, in Mr. Praed the father's presence and hearing, that Mr. Praed knew that he (Noell) could not take the bribery oath, and that Praed said nothing to contradict him. [397]

This question was objected to.

It was said, That it is an established rule, that no evidence shall be admitted upon oath, of what a man said when he was not upon oath (1). That

(1) *Vide supra*, Case of Shaftesbury, p. 308, 309.

to break through this rule might be attended with the worst consequences, for that many men who would not take a false oath, might be drawn in to say things that are false, in conversation, in the presence of a person placed on purpose within hearing, in order to be able to relate, afterwards, upon oath, what the other had said.

[398] The counsel for the petitioners admitted the rule, but said it did not apply to the evidence now offered, for that here the witness was to prove a declaration of Noell, and a charge brought by him against Praed in Praed's hearing, and which Praed did not contradict, and therefore seemed to admit to be true. That this was evidence of his behaviour upon such a charge being made against him, and therefore was certainly admissible in every court of justice.

The Committee over-ruled the objection.

On Monday, the 8th of May, the Committee, by their Chairman, informed the House, that they had determined,

That Mr. Drummond was duly elected; and that the election, with respect to one of the burgesses to serve in Parliament for the borough of St. Ives, was void.

And, accordingly, a new writ was ordered (1).

NOTES

ON THE CASE OF

S A I N T I V E S.

PAGE 396. (A). The following case is in point on this subject.

Note
(A.)

The KING *v.* the CHURCHWARDENS of WEORLY.

“ The court refused to grant a *mandamus*, directing to insert particular persons in the poors’ rate, upon affidavits of their sufficiency, and being left out to prevent their having votes for parliament men ; for that the remedy was by appeal, and this court never went farther than to oblige the making the rate, without meddling with the question who is to be put in, or left out, of which the parish officers are the proper judges, subject to an appeal.” Strange, 1259.

Ibid. (B:)

Note
(B.)

OF BRIBERY.

Bribery is one of the most important *Titles* in the law of elections. It is to be regretted, that the nature of the causes where questions of bribery arise, and are litigated by counsel,

Note
(B.)

fel, is such, that it is, for the most part, impossible to deduce * from the determination of the Committee, what their opinion was upon those particular questions. It may be useful in this place to bring before the reader a sort of general view of the subject.

Wherever a person is bound by law to act without any view to his own private emolument, and another, by a corrupt contract, engages such person, on condition of the payment or promise of money, or other lucrative consideration, to act in a manner which *he* shall prescribe, both parties are, by such contract, guilty of bribery.

It is clear, that every species of this offence must be considered as criminal; and accordingly the court of King's Bench, in a case which happened a few years ago, held, "That bribery at elections of members of Parliament, must always have been a crime at common law, and punishable by indictment or information (1)." There are, however, I believe, no traces of any action, or prosecution, for this kind of bribery, in the annals of Westminster-hall, till after the legislature thought fit to inflict particular penalties upon it, by the statute of the 2nd of Geo. II, cap. 24. If we look into Lord Coke, Hawkins, or the other writers on the Pleas of the Crown, we find that their definitions extend only to the corruption of men in judicial offices.

[401] Perhaps it is not difficult to account for the silence of the books of common law, on the subject of election bribery. About the time when the increase of money, and the growing importance of a seat in the House of Commons, first gave rise to the offence, the House began to assert their exclusive judicial power in whatever concerned the elections of their own members. Bribery essentially affecting the freedom of election, they took cognizance of, and punished, both the electors, and elected, who offended in that respect;

(1) The King v. Pitt, 3 Burr. p. 1338.

and when they were once in possession of this jurisdiction, and it was understood to be a matter of privilege, it would have been a dangerous attempt, in those days, in any prosecutor to carry a complaint on the subject to any other tribunal. Lawyers would have been very unwilling to undertake, and the Judges equally unwilling to entertain, such a cause in Westminster-hall. They would have probably said, as Mr. Justice Powis did, when another matter touching elections was, for the first time, brought before a court of common law, "The determination of this is particularly reserved to the Parliament: we are not acquainted with the learning of elections, and there is a particular cunning in it, not known to us (1)."

The first instance of bribery in the Journals of the House of Commons, is that of Thomas Longe, in the reign of Queen Elizabeth, which has been cited in so many books, that I should not repeat it here, if it were not for the difficulty I find in reconciling the entry of it in the Journals, with an observation which, in the report of the case of the King *v.* Pitt, is said to have fallen from the Chief Justice of the King's Bench on that occasion. The counsel against the prosecution in that case cited Lord Coke's account of Longe's case, in his 4th Institute (2), where he says, "That the mayor of Westbury was fined in the House of Commons." Lord Mansfield is made to say on this, "The latter part cannot be true. There could be no fine set there.—It must have been in the star chamber (3)." Now the words of the entry in the Journals are as follows:

[402]

"Forasmuch as Thomas Longe, gentleman, returned one of the burgesses for the borough of Westbury, in the county of Wilteshire for this present Parliament, being a very simple man, and of small capacity to serve in that place, hath this day in open court confessed, that he

(1) 2 Lord Raym. p. 944. (2) P. 23. (3) 3 Burr. p. 1336.

Note
(B.)

[403]

“ gave unto Anthony Garlande, mayor of the said town of
 “ Westbury, and unto one * Watts of the same town, the
 “ sum of four pounds for that place and room of burgefs-
 “ ship; it is *ordered* by this House, that the said Anthony
 “ Garlande, and the said Watts, shall immediately repay
 “ unto the said Thomas Longe the said sum of four pounds;
 “ and also that a fine of twenty pounds be *by this House*
 “ assessed upon the corporation or inhabitants of the said
 “ town of Westbury, to the Queen’s majesty’s use, for
 “ their said lewd and slanderous attempt; and that the said
 “ Thomas Longe, his executors and administrators, shall
 “ be discharged against the said Anthony Garlande and
 “ * Watts, their heirs, executors and administrators, of
 “ and for all bonds made, by the said Thomas Longe, to
 “ any person or persons, touching the discharge of the exer-
 “ cise of the said room or place of burgesfship, in anywise
 “ (1).”

It appears, therefore, that the House, *de facto*, did set a fine in this case, as they did in the case of Arthur Halle, which Lord Coke quotes in the same place. If the words ascribed to Lord Mansfield really fell from him, we must suppose that he meant, that, *de jure*, the House could not impose a fine, and that, in such cases, the star chamber was the court whose province it was, in those days, to inflict that punishment.

It is essential to the very idea of *election*, that it should be *free*, and this has been declared by the legislature in the statute of Westminster 1. (2), with regard to elections in general, and by the Declaration of rights (3), with regard to elections of members of Parliament. Hence it is understood that, independent of the positive statutes against bri-

(1) Journ. 9 May, 1571. vol. i.
 p. 88. col. 2.

(3) 1 Will. and Mar. 2 sess.
 cap. 2.

(2) 3 Edw. 1. cap. 5.

bery, whenever a person is returned in consequence of an undue influence acquired by that means, his election is void; and that every vote purchased by bribery is also void, the person who gave his voice under such* influence, being to be considered as if he had not voted at all. There are determinations of the House to this effect, previous to the statutes. Lord Coke tells us, that Longe was removed; and I think we may infer that he was, from the entry in the Journals, though it is not positively mentioned there. In the case of Stockbridge, 15 Nov. 1689, the election was avoided on account of bribery. Journ. vol. x. p. 287. col. 1, 2.

Treating, gifts, promises, &c. although of the same nature with bribery, yet not falling within the popular sense of the word, which is confined to the actual payment of money, were frequently substituted in place of a direct purchase, in the hopes that the offence, in that shape, would pass with impunity. This the House endeavoured to obviate, by the following resolution of the 2d of April 1677 (1), which was made a standing order, 21 October 1678 (2).

Resolved, "That, if any person, hereafter to be elected
" into a place for to sit and serve in the House of Commons,
" for any county, town, port, or borough, after the teste, or
" the issuing out of the writ or writs of election, upon the
" calling or summoning of any Parliament hereafter; or,
" after any such place becomes vacant hereafter in the time
" of Parliament, shall by himself, or by any other in his
" behalf, or at his charge, at any time before the day of his
" election, give any person or persons, having vote in any
" such election, any meat or drink, exceeding in the true
" value of ten pounds in the whole, in any place or places,
" but in his own dwelling-house or habitation, being the
" usual place of his abode for six months last past; or shall,

[405]

(1) Journ. vol. ix. p. 411. col. 1.

(2) *Ibid.* p. 517.

" before

Note
(B.)

“ before such election be made and declared, make any other
 “ present, gift, or reward, or promise, obligation, or en-
 “ gagement to do the same, either to any such person or
 “ persons in particular, or to any such county, city, town,
 “ port, or borough in general; or to, or for the use and
 “ benefit of them, or any of them; every such entertain-
 “ ment, present, gift, reward, promise, obligation, or en-
 “ gagement, is by this House declared to be bribery: and
 “ such entertainment, present, gift, reward, promise, obli-
 “ gation, or engagement, being duly proved, is and shall
 “ be sufficient ground, cause, and matter, to make every
 “ such election void, as to the person so offending, and to
 “ render the person so elected incapable to sit in Parliament
 “ by such election; and hereof the Committee of elections
 “ and privileges is appointed to take especial notice and
 “ care; and to act and determine matters coming before
 “ them accordingly.”

This order is clearly the model on which the statute of
 7 Will. III. cap. 4. commonly called the treating act, was
 formed, which however varies from it in several respects.
 It is thereby enacted,

[406]

Sect. 1. “ That no person or persons hereafter to be
 “ elected to serve in Parliament for any county, city, town,
 “ borough, port, or place, within the kingdom of England,
 “ dominion of Wales, or town of Berwick upon Tweed,
 “ after the teste of the writ of summons to Parliament, or
 “ after the teste or the issuing out or ordering of the writ
 “ or writs of election upon the calling or summoning of any
 “ Parliament hereafter, or after any such place becomes va-
 “ cant hereafter in the time of this present, or of any other
 “ Parliament, shall or do hereafter, by himself or themselves,
 “ or by any other ways or means on his or their behalf, or
 “ at his or their charge, before his or their election to serve
 “ in Parliament for any county, city, town, borough, port,
 “ or place within (*as above*), directly or indirectly give,
 “ present,

“ present, or allow to any person or persons, having voice
 “ or vote in such election, any money, meat, drink, enter-
 “ tainment, or provision; or make any present, gift, reward,
 “ or entertainment, or shall, at any time hereafter, make any
 “ promise, agreement, obligation, or engagement, to give
 “ or allow any money, meat, drink, provision, present, re-
 “ ward, or entertainment, to or for any such person or per-
 “ sons in particular, or to any such county, city, town, bo-
 “ rough, port, or place in general, or to or for the use, ad-
 “ vantage, benefit, employment, profit, or preferment of any
 “ such person or persons, place or places, in order to be
 “ elected, or for being elected, to serve in Parliament for
 “ such county, city, borough, town, port, or place.”

Note
(B.)

And, Sect. 2. “ That every person and persons so giving,
 “ presenting, or allowing, making, promising, or engaging,
 “ doing, acting or proceeding, shall be, and are hereby de-
 “ clared and enacted disabled and incapacitated, upon such
 “ election, to serve in Parliament for such county, city,
 “ town, borough, port, or place; and that such person or
 “ persons shall be deemed and taken, and are hereby declared
 “ and enacted to be deemed and taken, no members in Par-
 “ liament, and shall not act, sit, or have any vote or place
 “ in Parliament, but shall be and are hereby declared and
 “ enacted to be to all intents, constructions and purposes,
 “ as if they had been never returned or elected members for
 “ the Parliament.”

[407]

Notwithstanding this statute, bribery, in all its branches, was carried every day to greater excess, and the legislature found it necessary to make more effectual provisions to put a check to it, by inflicting severe penalties on the offenders, and by making it the interest of persons, privy to the offence, to make such discoveries as might bring them to justice. This was done by the act of the 2d of Geo. II. cap. 24. of which the following clauses deserve particular attention :

Sect. 1. “ Upon every election of any member or mem-
 “ bers

Note
(B.)

“ bers to serve for the Commons in Parliament, every free-
 “ holder, citizen, freeman, burgess, or person, having or
 “ claiming to have a right to vote or be polled at such elec-
 “ tion, shall, *before he is admitted to poll at the same elec-
 “ tion, take the following oath (or being one of the people
 “ called Quakers, shall make the solemn affirmation ap-
 “ pointed for Quakers), in case the same shall be demanded
 “ by either of the candidates, or any two of the electors;
 “ That is to say,

“ I, A. B. do swear, (or, being one of the people called
 “ Quakers, I, A. B. do solemnly affirm), I have not re-
 “ ceived, or had by myself, or any person whatsoever in
 “ trust for me, or for my use and benefit, directly or indi-
 “ rectly, any sum or sums of money, office, place or em-
 “ ployment, gift or reward, or any promise or security for
 “ any money, office, employment or gift, in order to give
 “ my vote at this election, (and that I have not been before
 “ polled at this election.)

Se^ct. 7. “ If any person who hath, or claimeth to have,
 “ or hereafter shall have, or claim to have any right to vote
 “ in any such election, shall, from and after the said 24th
 “ day of June which shall be in the year of our Lord one
 “ thousand seven hundred and twenty-nine, ask, receive or
 “ take any money or other reward, by way of gift, loan or
 “ other device, or agree or contract for any money, gift,
 “ office, employment, or other reward whatsoever, to give
 “ his vote, or to refuse or forbear to give his vote in any
 “ such election, or if any person by himself, or any person
 “ employed by him, doth or shall, by any gift or reward, or
 “ by any promise, agreement or security for any gift or re-
 “ ward, corrupt or procure any person or persons to give his
 “ or their vote or votes, or to forbear to give his or their
 “ vote or votes in any such election, such person so offending
 “ in any of the cases aforesaid, shall, for every such offence,
 “ forfeit the sum of five hundred pounds of lawful money of
 “ Great

[409]

“ Great Britain, to be recovered as before directed; (*i. e.*
 “ § 1. by action of debt, bill, plaint, or information, in any
 “ of his Majesty’s courts of record at Westminster; and if
 “ the offence shall be committed in Scotland, by summary
 “ action or complaint before the court of session, or by pro-
 “ secution before the court of justiciary), together with full
 “ costs of suit; and every person offending in any of the
 “ cases aforesaid, from and after judgment obtained against
 “ him in any such action of debt, bill, plaint, or informa-
 “ tion, or summary action or prosecution, or being *any*
 “ *otherwise lawfully convicted thereof*, shall for ever be dis-
 “ abled to vote in any election of any member or members
 “ to Parliament, and also shall for ever be disabled to hold,
 “ exercise, or enjoy any office or franchise to which he and
 “ they then shall, or at any time afterwards may be entitled,
 “ as a member of any city, borough, town corporate, or
 “ cinque port, as if such person was naturally dead.”

Note
(B.)

By Sect. 8. Any person offending against the act, who, within twelve months after the election, shall discover another person or persons offending against it, so as the person so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against the act, is exempted from the penalties and disabilities which he would otherwise incur.

[410]

By Sect. 11. (explained by the 9th of Geo. II. cap. 38.) those penalties and disabilities are not to take place, unless the prosecution be commenced within two years after they shall be incurred.

By the 16th of Geo. II. cap. 11. the provisions of the 2d of Geo. II. cap. 24. are extended to the election of delegates in Scotland (1), with this variance, that a different oath is thereby prescribed for the magistrates and counsellors, who are the electors of the delegates (2).

(1) 16 Geo. II. cap. 11. § 33.

(2) 16 Geo. II. cap. 11. § 34.

Upon

Note
(B.)

had issued, and Mr. Soame (or any new candidate) had then been elected, and returned, and he had vacated his seat a year afterwards, Sloane, according to the decision of the House, was then incapable of coming in his room. But, as far as I can understand them, the words of the statute do not warrant such a construction; much less can they mean that a person offending against the statute shall be for ever afterwards incapable of representing the place where the offence was committed; yet this seems to be asserted by a writer of great authority, when he says, "That it is enacted, that no candidate shall, &c. (reciting the prohibition of the act), *"on pain of being incapable to serve for that place in Parliament (1)."*

2. Is a candidate who, before the teste or issuing of the writ, or before the vacancy, has bribed one or more electors, but who has a majority of unbribed votes, and has been returned, capable of sitting on such return?

This case is not within the provisions of either of the statutes; and as it has never been contended, that a man who has been guilty, or is even convicted, of bribery, thereby incurs a general inability to be elected, it would seem, upon principle, that the majority of fair electors having chosen such a person, although in a place where some have been corrupted by him, their election ought to be as valid as if they had chosen a man who had been a candidate, and had bribed, in another place. But it is said, that the current of determinations is otherwise; and in this very case of *St. Ives*, it was understood, by the counsel on both sides, that Mr. Praed must have been declared duly elected, if the Committee had not thought that a person who has gained any votes by bribery is incapable of sitting on that election, although he have the voices of a majority of uncorrupted electors.

3. If there are two candidates, and one has been guilty of

(1) Blackst. Com. vol. i. p. 178. 4to.

bribery,

bribery, but still has a majority of fair unbribed votes, shall the other, on the bribery being proved on the first, be declared duly elected?

Note
(B.)

In the case of Chippenham, in 1691, Sir Basil Firebrass, the sitting member, had 60 votes; Mr. Talmash, the petitioner, only 44. Bribery was imputed to the sitting member. But only 14 of his votes were objected to, and the objections to 7 were given up; so that, deducting the other 7, he remained with a considerable majority. Yet the House resolved, 22 Jan. That Sir Basil Firebrass, by himself, or agents, had been guilty of bribery, and was not duly elected; and *that Mr. Talmash was duly elected* (1).

[415]

This case, however, is not sufficient to establish a doctrine clearly against reason and justice. If it is the law of Parliament, that a candidate who is guilty of bribing a single voter, cannot sit on that occasion for the place where he was guilty of the bribery, still, as the fact of his having so done is not to be presumed to have been known to the other fair electors who voted for him, their votes cannot be taken to have been thrown away, which they must be, in order to entitle the other candidate to the seat. The case of Chippenham was cited last winter in that of Shaftesbury, but it was little relied on, and the contrary doctrine seemed to be considered in general in all the bribery causes as unquestionable, viz. That a petitioner who proves bribery on the sitting member, must also disqualify by bribery, or otherwise, a sufficient number of the sitting member's votes to leave himself a majority, before he can be entitled to the seat.

4. If a candidate, or his agent, give, or promise money, or other reward, to a voter, in order to procure his vote for such candidate, and the voter afterwards vote for another candidate, is the first thereby disqualified from sitting even if he have a majority of legal votes?

(1) Journ. vol. x. p. 638. col. 2.

Note
(B.)

[417]

The counsel for the petitioner in the case of Shaftesbury maintained the negative of this proposition; yet, upon the same general, though inaccurate idea of an invasion of the freedom of election, on which alone the determination mentioned under the second question must have proceeded, it would seem that the affirmative ought to be adopted. It has been determined, by the Court of King's Bench, that, in such a case, the penalties of the statute of George the II^d. are incurred by the corrupter (1).*

5. If an elector receive a bribe, and in consideration thereof engage to vote for one candidate, and at the election vote for another, on whose behalf he has received no bribe, is the gratuitous vote given by such elector for the other a good vote, or void?

It was generally understood by the counsel, that, according to the state of the poll in the case of Saint Ives, Mr. Drummond could not have been declared duly elected, if the Committee had not thought that such votes were void. The Committee, in the case of Shaftesbury, was also supposed to have been of this opinion: the ground of which is this, That, by the oath prescribed by the statute of George the Second, the elector must swear, that he hath received no money, &c. "*in order to give his vote at that election.*" An elector who refuses this oath cannot vote. Therefore if he is proved to have been in such a situation at the election, that he could not have taken the oath without perjury, his vote, according to the true construction of the statute, ought not to be allowed. I have heard, however, that some very distinguished characters in Westminster-hall hold a contrary opinion. They think that the meaning of the oath is, that the elector shall swear that he had not received any

(1) *Sutton v. Norton*, 3 Burr. p. 1235. vote according to his request, though he in fact does not.]

[* If the voter has promised to

money,

money, &c. in order to vote for the person for whom he did vote. That at any rate, till the oath is tendered and refused, it can have no effect, and that the validity of the vote, till then, must depend on the general principle of the freedom of choice. That the choice made by the elector in the case put, is free, and unbiassed. That it is unquestionable that, if such elector had a vote at any other place, he might there, after receiving the bribe, vote for a person who had not bribed him (unless he had been previously convicted according to Sect. 7. of the statute of George the Second). That he might vote at the election of any other officer; as a mayor, a sheriff, &c. and his vote in those cases would be good; and that the election of one member for a place is as distinct a thing from the election of the other, as the election of a member for one place is from that of a member for another; or as that of a member of Parliament is from that of a sheriff or other officer. This idea is elucidated, if not corroborated, by what has been said in the case of Bristol, note (B), to show that formerly the two members for a place were not chosen *simul & semel*, and that there is no law which makes it necessary that they should be so chosen, at this day.

6. If an elector is proved to have acted as an agent in bribing other electors, but there is no proof that he himself was bribed, is his vote a good vote, or void?

Those who argue that it is void, say that the acting as an agent in bribing others is such an infringement of the freedom of election, that the law will *presume* that such agent was as little scrupulous with regard to himself, as he had been with regard to others.

[418]

7. If an elector receive a bribe in order both to vote himself, and to procure the votes of others, and he from that corrupt motive do procure the votes of others, but without corrupting them, and merely by persuasion, or a justifiable influence which he may have over them, shall the votes so procured be considered as good, or as being void?

Note
(B.)

I am not aware that this question has ever been agitated before a Committee of elections; but it was the chief point in the case of the annual election of the magistrates of the borough of Stirling in Scotland, for Michaelmas 1773, and the court of session, 1 March 1775, avoided the election on the ground that such votes were bad (1). As they must have determined this upon general principles, those principles would be equally applicable to votes at an election of a member of Parliament. But the decision was carried by a very small majority; I believe only of one voice; and an appeal was brought in the House of Lords, which stands first to be heard when the Parliament meets.

[419]

[The same point came into discussion in the case of *Irwin v. John Adam*, of Maryborough, July 1780; but it was not decided, no decree having been made in the cause.—*Wight*, p. 263.]

[8. Suppose there are two candidates, A. and B., C. a voter, takes a bribe to vote for A., and votes for him and for B., is his vote for B. bad?] •

☞ The resolution of the House concerning bribery, which is cited in the Case of Hindon (2), has been renewed at the beginning of every session, ever since 13 Feb. 170⁹, (2).

(1) John Paterfon and others p. 13. and in the case of the Appellants, pag. 3.
against James Alexander, Esq. and others. See the Interlocutor

(2) *Supra*, vol. i. p. 198.

(2) Journ. vol. xiii. p. 326, 327.

XXIV.

THE
C A S E

Of the DISTRICT of

NORTH BERWICK, HADDINGTON, LAUDER,
JEDBURGH, AND DUNBAR,

IN SCOTLAND.

The Committee was chosen on Tuesday, the 2d of May,
and consisted of the following Gentlemen:

Lord George Germaine, Chairman	} Members for	East Grinstead.
Charles Wolfeley, Esq. - - -		Milborne Port.
Lord Charles Spencer - - - -		Oxfordshire.
William Strahan, Esq. - - -		Malmesbury.
John Orde, Esq. - - - - -		Midhurst.
Sir Philip Hales, Bart. - - -		Downton.
Anthony Eyre, Esq. - - - -		Boroughbridge.
John Scudamore, Esq. - - -		Hereford.
Alexander Popham, Esq. - - -		Taunton.
Richard Benyon, Esq. - - -		Peterborough.
Charles Morgan, Esq. - - -		Breconshire.
Edmund Burke, Esq. - - - -		Bristol.
Robert Laurie, Esq. - - - -		Dumfriesshire.
N O M I N E E S :		
<i>Of the Petitioner,</i>		
Fletcher Norton, Esq. - - -		Carlisle.
<i>Of the Sitting Member,</i>		
Sir Cecil Wray, Bart. - - -		East Retford.

P E T I T I O N E R S :

Sir Alexander Gilmour, Bart.
Andrew Dickson, Esq. &c. Constituent Members of the
Town Council of the borough of Haddington, at Michaelmas, 1774.
The Magistrates and Town Council of North Berwick.
The Provost, Magistrates, and Town Council of the
borough of Dunbar.

Sitting Member :

The Honourable John Maitland.

C O U N S E L :

For the Petitioners,

Mr. Crosby, Mr. Lee.

For the Sitting Member,

Mr. Rae, Mr. Hardinge.

THE
C A S E

Of the DISTRICT of

NORTH BERWICK, &c.

ON Wednesday, the 3d of May, the Committee being met, and the petitions read, they all appeared to contain the same allegations, *viz.*

That, at the election of a member to represent the boroughs of North Berwick, Haddington, Lauder, Jedburgh, and Dunbar, at North Berwick, the presiding borough of the district for the time, on Monday the 31st of October, 1774, commissions were produced in favour of persons named as delegates for the several boroughs; and David Kinloch, Esq. appeared, and claimed a vote, as having been the person duly elected delegate for the borough of Haddington, though a commission [424] had been made out in favour of Robert Burton, Esq; provost of Haddington; and accordingly he gave his vote at the election, under protest; and that the delegates producing commissions from the boroughs of Haddington, Lauder, and Jedburgh, voted for the Hon. John Maitland, clerk of the Pipe in the court of Exchequer in Scotland, and

the delegates from North Berwick and Dunbar voted for Sir Alexander Gilmour, the petitioner. That Mr. Maitland had been returned, but Sir Alexander Gilmour was duly elected, and was therefore induced to make the present application for redress; for that Mr. Maitland was incapable of representing this district of boroughs, or sitting as a member in the Parliament of Great Britain (A), by virtue of the statute of the 6th Anne, cap. 7. § 5. his office of clerk of the Pipe, in the court of Exchequer in Scotland, having been created or erected since the 25th of October, 1705; and that, besides this, the two commissions for the boroughs of Haddington and Jedburgh granted to Mr. [425] Burton, and Mr. Hogg, as their delegates, were granted by persons who were by law incapable of electing a delegate, having no right themselves to the offices they assumed in the said boroughs; and the said commissions were procured by bribery, corruption, and undue influence; and, if there were any persons entitled to elect a delegate for the borough of Haddington, David Kinloch was the person duly elected, and his vote only was a good vote; and that in consequence of these, and many other objections to the election of Mr. Maitland, it would appear that Sir Alexander Gilmour was the person duly elected for the said district of boroughs; Praying therefore, (1), &c.

From this state of the allegations of the several

(1) Votes, 7 Dec. 1774. p. 44. 45.

petitions, it appears that the two general questions in the case were,

1. Whether Mr. Maitland was eligible.
2. Whether he, or Sir Alexander Gilmour, had the majority of legal votes.

It was proposed by the Committee, that the first question should be argued and determined separately. [426]

By the statute of the 6th of Anne, cap. 7. § 25, it is enacted as follows :

“ That no person, who shall have in his own name, or in the name of any person or persons in trust for him, or for his benefit, any new office or place of profit whatsoever under the Crown, which at any time since the five-and-twentieth day of October, in the year of our Lord one thousand seven hundred and five, have been *created or erected*, or hereafter shall be created or erected, shall be capable of being elected, or of sitting or voting as a member of the House of Commons, in any Parliament which shall be hereafter summoned and holden.”

The counsel for the petitioners contended, that the office of clerk of the Pipe, which Mr. Maitland was admitted to have been possessed of at the time of the election, was a new office of profit, under the Crown, within the meaning and description of the statute.

In the following state of the material circumstances concerning this part of the case, the facts were, in part, admitted, and, in part, proved by authenticated [427]

authenticated papers, and by the parole testimony of Mr. Walker and Mr. Mackenzie, two attornies belonging to the court of Exchequer in Scotland.

There existed in Scotland a court of Exchequer, as far back as any authentic history of that country goes. The court consisted of the Lords of the Exchequer, and a number of clerks and other inferior officers. By an *establishment*, or account of the officers of the Exchequer and their salaries, which bears date in 1698, and is the latest to be found before the Union, it appears that there were then belonging to the court—A clerk of the sheriff's roll, a clerk of the borough roll, two clerks to the Lord Register and Exchequer, and a presenter of signatures. All these clerks held their offices for life, by virtue of commissions *from the Lord Register*. The salary of the first was only 136l. 13s. Scots. Of the second 180l. Scots. Of the two clerks of Exchequer 1,000l. Scots. In the commission to a clerk of Exchequer, he was styled deputy to the [428] Lord Register, dictator of the rolls, and keeper of the property-roll.

By the treaty of union, all the ordinary courts of justice in Scotland were left with their former constitutions and jurisdictions. But with regard to the Exchequer, there was the following stipulation:
 “ That there be a court of Exchequer in Scotland
 “ after the union, for deciding questions concern-
 “ ing the revenues of customs and excises there,
 “ having the same power and authority in such
 “ cases, as the court of Exchequer has in England;
 “ and

“ and that the said court of Exchequer in Scotland
 “ have power of passing signatures, gifts, tutories,
 “ and *in other things*, as the court of Exchequer at
 “ present in Scotland hath; and that the court of
 “ Exchequer that now is in Scotland do remain,
 “ until a new court of Exchequer be settled by the
 “ Parliament of Great Britain in Scotland after the
 “ Union.” (1)

In the year following, (1707) a court of Exchequer was “ settled, established, erected, and
 “ constituted,” in Scotland, according to the above [429]
 stipulation, by the statute of the 6th of Queen
 Anne, cap. 26.

It was thereby enacted, that the Lord High
 Treasurer of England, a Chief Baron, and four
 Barons to be (2) appointed by the Crown, should
 be judges of the court, and should hold their
 offices “ *quamdiu se bene gesserint*.” (3)

The third and twenty-first sections are in the
 following words :

Sect. 3. “ And it is further enacted by the au-
 “ thority aforesaid, that there shall be in the said
 “ court of Exchequer in Scotland, the several of-
 “ fices following; that is to say, the office of
 “ Queen’s remembrancer, the office of Lord Trea-
 “ surer’s remembrancer, the *office of clerk of the Pipe*,
 “ and such other offices now in being in the court of
 “ Exchequer in England, or [as] are now in being in
 “ Scotland, relating to signatures, gifts, and tuto-

(1) Art. 19. (2) Sect. 24. (3) Sect. 2.

"ries, as the Queen's Majesty, her heirs, and suc-
 "cessors, shall from time to time think fit and
 "proper, to be constituted and appointed under
 "the seal which by the said articles of union is
 [430] "appointed to be kept in Scotland: and that such
 "persons shall be the masters or chief officers of
 "and in the said respective offices, and for such term,
 "estate, and interest therein, as the Queen's Ma-
 "jesty, her heirs and successors, shall from time to
 "time by letters patent under the seal aforesaid
 "ordain or appoint, and that the said masters or
 "chief officers of the aforesaid several officers shall
 "have and appoint from time to time under them,
 "and in their respective offices, such and so many
 "attorneys and clerks as shall be fit and proper
 "for the business in their respective offices; which
 "said masters and chief officers, as also the said
 "attorneys and clerks, shall, before their ad-
 "missions into their offices or places respectively,
 "take such oath or oaths in the said court, or be-
 "fore the Chief Baron, or one of the Barons of the
 "said court, for their faithful and honest carriage
 "and behaviour in their said offices respectively,
 "as the like officers, attorneys, and clerks in the
 "court of Exchequer in England have used and
 "ought to do, or as by the Barons of the said
 [431] "court of Exchequer in Scotland shall for that
 "purpose be devised and appointed."

Sect. 21. "Provided always, and be it enacted,
 "that the *two principal clerks of Exchequer* in Scot-
 "land, and other officers in that court, who have
 "grants

“ grants of their offices during life, or of inheritance, shall enjoy their offices according to the nature of their gifts, except in so far as these offices are inconsistent with the constitution of Exchequer, as the same is settled by this act: In which case, be it enacted by the authority aforesaid, that any person having right to any such office, shall be provided in one or other of the offices established by this act, equal in value to what they now enjoy, to hold for life, or in fee respectively, or have some other equivalent recompence for the loss of such office.”

At the time of the Union, the two clerks of Exchequer were Mr. Colin Mackenzie, and Mr. William Stuart.

After the establishment made by the 6th of Queen Anne, cap. 26. took place, a new commission was granted *by the Crown* to Mr. Mackenzie, [432] appointing him *clerk of the Pipe*, jointly with Mr. Tyas, an English lawyer, and another to Mr. Stuart, appointing him joint Queen's remembrancer with Mr. Tarvar, who was also an English lawyer. Mr. Mackenzie, in his new commission, was styled *Recordator magni rotuli, sive clericus pipæ*. In the subsequent commission, the word "*ingrossator*" was substituted for "*recordator*." The former presenter of signatures continued to enjoy the same office without a new commission, and that office still subsists in Scotland.

The clerk of the Pipe has no functions relative to the duty of the court of Exchequer as a court of

of English law ; the accounts which pass through his hands are those relating to the excise, customs, seizures, land-tax, and salt-tax. These accounts are first enrolled by each of the remembrancers, and then by the clerk of the Pipe (1). There are not in the office of the latter any records prior to the Union. The property-roll is now kept by the King's remembrancer.

[433]

COUNSEL for the Petitioner.

It is evident, from the words of the statute establishing the new court of Exchequer in Scotland, as well as from a comparison between the functions of the clerk of the Pipe, and of the former clerks of the Exchequer, that the office of clerk of the Pipe was *created* by the statute. It is impossible to prove an analogy between this office, and that of any of the former clerks. It is supposed, that it will be said to be the same with *dictator of the rolls* ; but if so, why was a new commission thought necessary for Mr. Mackenzie, or for Mr. Stuart ? There was no new commission granted to the presenter of the signatures, because his office continued under the new establishment.

If the clerk of the Pipe had any part of the department of any of the old officers, some records relating to that department would still remain in his custody. But even if a distant resemblance were to be traced between one of the old, and this new

(1) 6 Anne, cap. 26. Sect. 11.

office, still, as the former were in the gift of the Lord Register, and this is appointed to by the Crown, it is new in that respect, and is therefore within both the words and the spirit of the disqualifying clause of 6th Anne, cap. 7.

COUNSEL *for the Sitting Member.*

The intention of the legislature, with regard to the disqualifying clause, in the act of the 6th of Queen Anne, will be best known by tracing its history.

Before the Revolution, there was no statute by which the holder of any office was disabled from sitting in Parliament. By the 12th and 13th of William the Third, cap. 2. called *the act of settlement*, it was provided, that after the limitation of the Crown to the House of Brunswick should take effect, no person who should hold an office or place of profit under the King, or should receive a pension from the Crown, should be capable of serving as a member of the House of Commons (1). This provision was soon discovered to be too rigid. It was perceived, that such a general disqualification of all officers appointed by the Crown, would be attended with the utmost inconvenience, by excluding from the legislative body, those men, who, from their abilities and experience, were best fitted for giving information to the House, relating to the different branches of the public business. Ac-

[435]

(1) § 3.

cordingly,

cordingly, in the 4th year of Queen Anne, a new act of settlement took its rise in the House of Lords, in which was inserted a general repeal of the disqualifying clause in the former. The Commons, unwilling to agree to this general repeal, proposed, when the bill was sent down to them, that particular offices should be excepted, and the disqualification remain as to all others. A conference ensued between the two Houses, and a middle course was suggested by the Lords, and adopted; viz. that all new offices, and certain old ones, to be specified in the act, should disqualify; and that all the other offices then existing should be tenable with a seat in Parliament.

[436] The act accordingly passed (1), and the disqualifying clause was penned in the very same terms with that of the subsequent statute of the 6th of Queen Anne, cap. 7.

The reasons of the Lords for not agreeing to the amendment proposed by the Commons, and for proposing the plan which was adopted, are to be found in the xvth vol. of the Journals, and are to be considered as a parliamentary explanation of the meaning of both the acts. The 6th reason is as follows, "The amendment made by the Lords, " secures the kingdom against future excesses, in " multiplying offices (*not necessary* for the interest " of the government) upon any *indirect account*, " by disabling all who shall hereafter come into " any new created or erected offices from being

(1) 4 Anne, cap. 8.

" elected,

“ elected, or from sitting or voting as members of
 “ the House of Commons (1).” From this it is
 very clear that the object was to exclude, not of-
 fices created by Parliament, which would not be
 presumed capable of *indirect purposes* in such cre-
 ation, but offices which the Crown might create
 without necessity, and with the disguised intention
 of extending its influence. The statute of the 4th [437]
 of Queen Anne, having been made before the
 union, did not extend to Scotland, and, therefore,
 in the first Parliament of Great Britain, a clause
 was inserted in the statute of the 6th year of that
 reign, cap. 7. in the same words with the former,
 clearly for no other purpose but to carry the pro-
 vision of the former to the other part of the united
 kingdom. It cannot, therefore, affect an office,
 which, so far from being created by the Crown for
 any indirect purpose, was established by Parlia-
 ment, in consequence of a solemn treaty between
 the two kingdoms.

In 1730, in consequence of an address to the
 King, Mr. Frecker, of the treasury, delivered into
 the House a list of all the offices under the Crown,
 which had been erected since the 25th of October,
 1705. The object of the application to the King
 for this list, was to ascertain what persons were
 disqualified from sitting in Parliament (2). That [438]
 list consists of five folio pages, but it contains only

(1) Journal, 11 Feb. 170 $\frac{3}{4}$,
 vol. xv. p. 140.

(2) 16 Feb. 17 $\frac{3}{4}$, Journ.
 vol. xxi. p. 441.

offices created by the Crown; and at the end of it, there are these words, "All the offices or employments under the Crown in Scotland, were settled and established in consequence of the union of the two kingdoms, which took place the 1st of May, 1707, and it is humbly apprehended they were not designed to be included in this account (1)."

This shows, that at that time, when the subject of disqualifying offices was so much agitated, it was understood that those created in consequence of the treaty of union, were not of that sort. If the House had not thought so, they would have desired that such offices should be added to the list.

What has been hitherto said, would apply to the office of the clerk of the Pipe, if it clearly were a new office, since 1705. But that is not the case.

[439] The court of Exchequer had always two provinces; That of managing the revenue accounts, and that of judging revenue causes. This appears from a number of Scotch acts of Parliament, 1st Parl. of Car. I. cap. 18. (which refers to one of James the First of Scotland, on the same subject) 1st Parl. of Car. II. cap. 59. 2d Parl. Car. II. cap. 12. 3d sess. of 2d Parl. Car. II. cap. 16. The court, therefore, established after the union, was in substance the same with the former. In a manuscript treatise, ascribed to Baron Scrope, and written in the reign of George the Second, the business of the

(1) Journ. vol. xxi. p. 525, 3 April, 1730.

court is said to have been the same for 300 years back. It had the same general functions; but, as the English law relating to the customs and excise was extended to Scotland, such alterations were necessary, as might enable it to try and determine questions arising on those subjects, according to the law of England. The English names were adopted both for the judges and officers of the court, and it was found expedient to have English gentlemen, conversant in that law, appointed to some of the offices. Accordingly, two English gentlemen were joined with the two clerks of the Exchequer, and for that purpose new joint commissions were necessary. [440]

The court of Exchequer ought to be considered as one great ancient office, new modelled, after the union, and consisting of a number of members, who, after that æra, received new names, and new powers. Is it then contended, that new powers bestowed upon an old office, work a disqualification? Would the Lord High Treasurer of England, if a commoner, be disqualified from sitting in Parliament, because, since 1705, to the former functions of his office, are added those of a member of the court of Exchequer in Scotland?

A superadded salary, according to the spirit of the statute of Queen Anne, might, with more reason, be supposed to have that effect on an old office. But that this is not so, was determined by the House, in the case of Mr. Corbett, returned for the borough of Saltash, in 1739.

“ The 20th February, 17³⁴/₂, a motion being
 “ made, and the question put, that Mr. Speaker
 “ do issue his warrant to the clerk of the crown,
 “ to make out a new writ for a burges, to serve
 “ in this present Parliament, for the borough of
 “ Saltash, in the county of Cornwall, in the room
 “ of Thomas Corbett, Esq. who hath accepted of
 “ a salary of 200l. per annum, by his Majesty’s
 “ royal sign manual, dated the 14th of August,
 “ 1739, as secretary to the court of assistants, for
 “ relief of poor widows of commission and warrant
 “ officers of the royal navy, established by virtue
 “ of a commission, under the great seal, bearing
 “ date the 30th of August, 1732.”

It passed in the negative, on a division, 223 to
 132 (1).

[442] Great stress is laid upon the difference in the
 appointment to the clerkships in the Exchequer
 before and since the union. But, in the first place,
 it is not clear but that the King might, when he
 chose, appoint to those offices before the union.
 We learn from Lord Fountainhall, that in the
 commission of Lord High Treasurer of Scotland,
 granted to the Duke of Queensberry in 1682, the
 power of appointing the clerks in the Exchequer
 was given to him. And the same author adds,
 that formerly the King used to appoint them (2).

In the second place, an old office, by coming to

(1) Journ. vol. xxiii. p. 473. col. 1, 2.

(2) Vol. i. p. 186.

be in the appointment of the Crown, does not, on that account, incapacitate from being chosen and sitting in Parliament. Before the rebellion in 1745, the office of high sheriff in Scotland was hereditary, and every high sheriff appointed his own deputy. Soon after that epoch, by a statute of the 20th of George the Second, cap. 43. the hereditary sheriffdoms were abolished, and the appointment both of high sheriffs and of sheriffs depute vested in the Crown (B). The judicial authority, formerly exercised by the high sheriffs, was given to the deputes. Yet the legislature did not think that either their new powers, or the circumstance of their being now appointed by the Crown, brought them within the meaning of the statute of the 6th of Queen Anne. When it was found expedient to render them incapable of serving in Parliament, an express provision in a subsequent statute was necessary for that purpose (1). [443]

After what has been said, it will not be thought necessary to ascertain with accuracy, what the functions of any of the clerks in the Court of Exchequer before the union are, which are now exercised by the clerk of the Pipe. At this distance of time it is very difficult to trace all the duties, peculiar to the different clerks under the old establishment. The respective accounts in each different department seem to have been enrolled only in that department. The clerk of the Pipe, who now enrolls

(1) 21 Geo. II. cap. 19. § 11.

all the accounts after the two remembrancers, and is thereby a check upon them, does, in that respect, the duty of all * the former clerks. From the resemblance of the names of dictator of the rolls, and *ingrossator magni rotuli*, it is probable, if the nature of the duties of the dictator of the rolls were better known, that we should find that they correspond with those of the clerk of the Pipe.

If the law on the present question were doubtful, usage, the best interpreter of doubtful laws, is strongly in favour of the sitting member. From the 6th of Queen Anne, down to the present time, both clerks of the Pipe and remembrancers of the Exchequer (and if the former had been within the meaning of the statute, the latter must have been so likewise), have been returned, and have sat in Parliament. William Stuart, the first King's remembrancer, was elected and returned in 1713 for the district of Inverness, Nairn, Forres, and Fortrose, and styled in the return, William Stuart, remembrancer of the Exchequer. In 1747 Andrew Fletcher, junior, of Saltown, then clerk of the Pipe, was elected and returned for the district which is the subject of the present contest. In 1754, John Stuart, of Castle Stuart, who had succeeded Fletcher in the office of clerk of the Pipe, was re-elected for the place which he represented when he accepted of the office. In the return he also was particularly described as clerk of the Pipe. (The returns in the instances just stated were given in evidence.)

[445]

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In

In 1769 there was a contest for this very district of boroughs, between Mr. Warrender, King's Remembrancer, and Mr. Ogilvie. The former was returned, and a petition was presented against him, but there was no objection taken to his eligibility, although one of the counsel for the present petitioner was one of the delegates who on that occasion had voted for Ogilvie. The doctrine which he now maintains is such a novelty, as never to have been heard of in Scotland six years ago.

If any members of the court of Exchequer in Scotland, under the new establishment, were disqualified by the 6th of Queen Anne, the Barons themselves must have been so. But, before the statute of the 7th of George the Second, cap. 16. [446] by which they and the Lords of Session were expressly disqualified, there are two instances of their sitting in Parliament; those of Baron Scrope and Baron Miller. In 1727, the latter had been a candidate for the borough of Petersfield, together with Mr. Taylor, who was returned. Baron Miller petitioned the House. The Committee of elections, the petition having been referred to them, reported in favour of Taylor, though not on the ground of Miller's supposed incapacity.—It would seem that that point was not started in the Committee. But the House disagreed from the resolution of the Committee. When a motion was made, and the question proposed, that Miller was duly elected, the 19th article of the treaty of union, and the 25th sect. of the 6th of Queen Anne,

Anne, were read, so that *then* his eligibility was questioned; yet it was resolved, 9 May, 1727, that he was duly elected (1).

[447]

COUNSEL *for the Petitioner, in reply.*

The statutes of the 12th and 13th of William the Third, and of the 4th of Queen Anne, have nothing to do with the present question. As to what passed in the two Houses on occasion of the latter, that could have been of no weight, if the question had arisen on that very statute, since, in construing laws, a court of justice must not be led from the plain meaning of the words, by what they may guess concerning the history, of the law.

[448]

According to the doctrine of the counsel for the fitting member, the statute of the 6th of Queen Anne is to be construed as if after the words "created or erected," there had followed these words, "*by the royal authority.*" But no such restrictive construction is authorized by any thing in the statute, or by any decision of the House upon it. In the list delivered into the House, in 1730, there are offices created by Parliament; for instance, the office of the commissioners for hackney coaches. Mr. Frecker's opinion of the meaning of the orders given to him, can surely be of no consequence in the interpretation of an act of Parliament. The object of the statute was to prevent

(1) Journ. vol. xx. p. 861. col. 2.

the influence of the Crown. That influence is equally great over a person holding an office in the gift of the Crown, whether his office was originally created by the royal prerogative or by act of Parliament.

The circumstance related by Lord Fountainhall concerning the Duke of Queensberry's commission, only proves that the Crown, on that occasion, had encroached on the rights of the subject. His book furnishes many instances of the same sort in those times. As to the case of the sheriffs depute, their's cannot be considered as a new office; for the King, by the statute of the 20th of George the Second, had all the powers of the hereditary sheriffs vested in him, and therefore, of course, came to name the deputies, as being as it were high sheriff in every county in the kingdom.

The case of Mr. Corbett has no analogy to the present.

The case of Baron Scrope can prove nothing, as it passed *sub silentio*. That of Baron Miller happened in factious times. The disqualifying clause in the statute of the 7th of George the Second was probably inserted, as far as regards the Barons of the Exchequer, to *declare* the law, and prevent the case of Miller from being considered as a precedent. [449]

As to the usage, the whole amount of the evidence concerning the office now in question is, that two persons holding it have sat in Parliament, to whom there does not appear to have been any opposition.

position. These, therefore, are also cases which passed *sub silentio*. It cannot be contended, that two instances of offenders against a statute, who escaped with impunity, are sufficient to repeal that statute. The description of those two persons as clerks of the Pipe, in the returns, at a time when there was no contest, has very much the appearance of an attempt to create a precedent against the obvious meaning of the statute.

[450] The counsel for the sitting member have not been able to trace any similarity between the office of dictator of the rolls and that of clerk of the Pipe, although they wish the Committee to consider them as one and the same. The *magnus rotulus*, whence the clerk of the Pipe derives a name in which they find some resemblance to that of *dictator of the rolls*, certainly did not exist in Scotland before the union. The thing and the name both were taken from the court of Exchequer in England, where the clerk of the Pipe is also styled *ingrossator magni rotuli*.

☞ They denied that the manuscript referred to by the counsel for the sitting member was written by Baron Scrope, and said that it is of no authority, and is never quoted in the court.

The Committee, after deliberation, informed the counsel that they were of opinion,

“ That the Hon. John Maitland was eligible to
 “ serve in Parliament, notwithstanding his being
 “ in possession of the office of clerk of the Pipe in
 “ the

“ the Exchequer of Scotland, at the time of his
“ election.”

The first question being decided in favour of the sitting member, it now became necessary for the counsel on the part of the petitioners to endeavour to show that he had not the majority of legal votes.

Of the five delegates who produced commissions at the election, three voted for the sitting member, and only two for Sir Alexander Gilmour. The commissions of those delegates, whose votes were objected to, were authenticated in the manner prescribed by the statute of 16 Geo. II. cap. 11. § 30. so that, by the express provision of that statute, the clerk of the presiding borough, who is clerk of the election meeting, and returning officer, was bound to receive their votes. Various objections were made at the election to the delegates for Haddington and Jedburgh. On the supposition that there was no legal delegate for Jedburgh, the right of presidency devolved on Dunbar, and, on that ground, the delegate for Dunbar gave his casting vote in favour of Sir Alexander Gilmour.

[452]

If the delegates for Haddington and Jedburgh were both illegal, Sir Alexander Gilmour had two legal votes, and Mr. Maitland only one. If only the delegate for Jedburgh was illegal, the voices were two and two, and the casting vote of the delegate who in such case had the right to preside, was given for Sir Alexander Gilmour. So that,

on

on either supposition, he would be entitled to be declared duly elected.

By the 9th section of the statute of the 2nd of George the Second, cap. 24. it is enacted, " That
 " the said statute shall be openly read at the an-
 " nual election of magistrates and town counsellors
 " for every borough within that part of Great
 " Britain, called Scotland."

This provision was not complied with at the last annual election of magistrates and counsellors, either at Haddington or Jedburgh.

[453] The counsel for the petitioners argued, That this omission rendered the election of the magistrates, and consequently their election of delegates, void. That as no particular person is fixed upon by the statute, for reading it at such annual elections, who might be indictable if he neglected that part of his duty, the disobedience of the positive command of the statute cannot be punished in any other way, but by setting aside the whole proceedings at the election where it is not complied with. That, to give any substantial effect to this part of the law, it must be understood that such was the intention of the legislature.

The counsel for the sitting members insisted,

That this provision of the statute was only *directory*, and they proved that it is not usual to comply with it unless some member of the meeting desire it, which was not done either at Haddington or Jedburgh.

✶ The

↪ The counsel for the petitioners, in their reply, seemed to abandon this point.

No other objection was made to the delegate for Haddington.

The last election of magistrates and counsellors [454] for Jedburgh, was objected to on two other grounds.—Bribery; and a departure from the *sett* of the borough.

The counsel for the sitting member contended, that the Committee were not competent to go into those questions. This was a sort of plea to the jurisdiction. They argued as follows :

Before the union, the Parliament of Scotland had never made any provision, concerning questions arising on the election of the magistrates and counsellors of the royal boroughs, but left any contest which happened on that subject, to the convention of boroughs, or the ordinary course of common law.

The first British statute, where the election of those magistrates and counsellors is mentioned, is that of the 7th of Geo. II. cap. 16. By the 7th section of that statute, “ It is declared and enacted
“ to be lawful for any magistrate or counsellor of
“ a borough, who apprehends any wrong was done
“ at any annual election, to bring his action be-
“ fore the court of session in Scotland, for rectify- [455]
“ ing such abuse, or for making void the whole
“ election (if illegal) *only* within the space of eight
“ weeks after such election is over.”

By the 16th of George the Second, cap. 11. sect.

24. the right of complaining was extended to the constituent members of any meeting for, or previous to, any election of magistrates or counsellors; and the limitation in point of time was made two kalendar months instead of eight weeks.

The present petitioners are not within the description of the persons entitled to complain under either of the two statutes. They could not therefore have complained to the court of session, whose jurisdiction is unquestionable, and surely their complaint is not competent before this Committee, which at most can only have a concurrent and co-extensive jurisdiction with that court.

If, in any case, such a complaint can be heard, by a Committee of the House of Commons, it can only be where application has been previously made to the court of session, within the time limited [456] by the act of Parliament; and that has not been done in the present instance (1). (It appeared that a complaint had been lodged with the court of session, within the two months, on the ground of the statute of 2 Geo. II. cap. 24. not having been read; but there was no mention in that complaint of the supposed departure from the *sett* of the borough, and the complainant had not proceeded in the cause, nor served any warrant on the magistrates).

(1) See the case of Clackmannan, *supra*, p. 362, 363.

COUNSEL *for the Petitioners.*

It appears by the statutes which have been cited by the counsel on the other side, that neither a candidate, nor any member of another borough in the same district, can complain of the undue election of magistrates and counsellors for a borough in Scotland, to the court of session. Yet, surely, this is a matter in which they are deeply interested, as it may materially affect the choice of the representative in Parliament. Wherever there *may* be an injury, the law will always provide a remedy; [457] and if the present petitioners have reason to think, that they have been injured in a case where they cannot receive redress in any other tribunal, this Committee is on that account more particularly bound to hear their complaint. The *direct* question which is now proposed for the decision of the Committee is, whether the delegate for Jedburgh was legally chosen, and they are the only court competent to *that* question. But if the legality of the choice of the annual magistrates comes to be controverted, so as that must be determined before the legality of the choice of a delegate can be decided, there cannot be a doubt of the right of the Committee to decide that preliminary point. It is an incontrovertible maxim, that wherever a court has a right to decide on any point, that court may first enquire into, and determine such preliminary questions as are necessary to the ultimate determination.

If

If a previous complaint to the court of session were necessary (which it certainly is not), such a complaint has been made; and it surely was not necessary, in that * complaint, to enter into all the objections to which the election of the magistrates was liable. No advantage can be taken of the complainant's not having proceeded in that cause, and not having served the parties complained of with a warrant, since the time allowed by the law of Scotland for that purpose is not yet elapsed.

The Committee determined immediately (without clearing the court), that the counsel for the petitioner should proceed.

The election of magistrates for the borough of Jedburgh had been set aside by the court of session, in 1767, on the ground of bribery; so that the corporation was in a manner dissolved; and it continued in that state till July, 1774, when it was revived by a poll-election. The first annual election, after this revival of the borough, was that now complained of.

The counsel for the petitioners stated, that the last election of magistrates was produced by the influence of the same bribery and corruption which had occasioned the former judgment of reduction, and they were going to produce evidence of that [459] bribery, but the Committee resolved not to hear any evidence of bribery, unless what could be shewn to have taken place, with an immediate design to influence the election under their consideration.

deration. Upon this the counsel for the petitioner abandoned the point of bribery, and the only question which now remained to be argued was,

Whether, at the last annual election of magistrates and town counsellors for Jedburgh, there had been such a departure from the *sett* of the borough as was sufficient to vitiate and annul the election?

The constitution of a royal borough in Scotland, by which the mode of electing its annual magistracy is regulated, is called the *sett* of the borough. The origin of those setts is not known. They are thought to be derived from ancient charters which are now lost; but usage, in the progress of time, has probably occasioned many deviations from the first forms prescribed by the charters.

After the Union, the magistrates and counsellors (who formerly elected the representative of their borough in the Scotch Parliament) came to be the electors of the delegate, and as it was soon foreseen that it would be very necessary to ascertain the mode of choosing the magistrates and counsellors in the different boroughs, the convention of boroughs, in 1709, ordered an account of the setts of each borough to be transmitted to them, which was accordingly done, and they were inserted in their books. The *sett* of every borough is likewise preserved in the corporation-books of that borough. [460]

The following is an exact copy of the *sett* of Jedburgh, as extracted from the corporation-books

Vol. II.

B b

by

by the town-clerk, and produced by him to the Committee.

SETT of the Burgh of JEDBURGH.

“ The way and manner of the annual election of
“ the magistrates and council of the burgh of Jed-
“ burgh is as follows; *viz.* the council consists of
“ twenty-five persons, to wit, a provost, four
“ baillies, dean of gild, and treasurer. There
“ being eight trades who choose their deacons
[461] “ yearly, four of these deacons are always upon
“ the council, the conveener being always one of
“ the said four. The rest of the council consists
“ for the most part of marchants and other inha-
“ bitants of several employments not being trades-
“ men, for no tradesmen are allowed to be upon
“ the magistracy or council except the four coun-
“ cel deacons.
“ The election is *ordinarily* upon the twenty-
“ seventh, twenty-eight, and twenty-ninth days
“ of September yearly. Some days before, to wit,
“ upon the twenty-third and twenty-fourth of
“ the said moneth of September, the provost con-
“ veens the council for taking of the treasurer’s
“ accompts for the preceding year, and for electing
“ and leeting of the new council and deacons of
“ craft for the year to come, and which, with the
“ old council, there being eleven chosen, *out of*
“ *the two and twenty*, for the new council, and
“ eight deacons of craft, make up in the hail,
“ with the old council, the number of forty
“ persons,

“ persons, which elects the provost, four baillies,
 “ dean of gild, and treasurer for the ensuing year.
 “ These * being so chosen and elected, the eight
 “ deacons are removed from the council table, and
 “ being removed, the old and new council elects
 “ four of these to be upon the council for the en-
 “ suing year. *Thereafter* the old and new council
 “ is all removed, except the magistrats, dean of
 “ gild, and treasurer, who puts out four of the old
 “ council, and takes in four of the new council
 “ in their room. *Thereafter* the eight trades con-
 “ veens, and choises one of the four council dea-
 “ cons to be their conveyer. This is a true sett
 “ of the burgh of Jedburgh, extracted furth of
 “ the records thereof By

J^N° AINSLIE.”

It appeared from the witnesses that, by the usage of the place, the manner of leeting the deacons is this :

The eight old deacons give in eight lists or leets, each containing the names of three freemen of the respective eight companies or trades. These leets being approved of by the old council, are returned to the deacons, who, with their respective trades, elect one out of each, to be the deacon of that trade for the year ensuing. The eleven new counsellors are chosen by the old council before the leeting of the deacons, and are called day counsellors.

[463]

✠ The words “ *out of the two and twenty,*” in

the sett, are superfluous, and only perplex the sense. The meaning of them is, that out of the twenty-two counsellors which make part of the forty (which are called the long council), there are eleven new ones.

The material evidence on this part of the case consisted of the minutes of the last election, the corporation-books of Jedburgh, and the parole testimony of Mr. Ainslie, joint town-clerk of Jedburgh with one Fair, and of Baillie Anderson, one of the magistrates. An objection was taken to the admissibility of the latter, but over-ruled.

[464] It appeared, that, at the last election, the first meeting was on the 28th of September, and the election of magistrates on the 29th; but that the last step, *viz.* the striking off the four old counsellors, and choosing the four new ones, which is called *purging* the council, did not take place till the 9th of October, which was after the precept for the election of a delegate had been received, and the day before the council met for appointing a peremptory day for choosing the delegate. The minutes of the 29th, were written by Ainslie, and one Baillie Brown his deputy. But the account of the purging the counsel was written by the other joint clerk's deputy; and this was carried on without a new date, in this manner, "*Thereafter, &c.*" From the 29th, the books continued in the hands of Fair, till they were delivered up in consequence of the Speaker's warrant.

An attempt was made to show that leaves had
been

been torn both out of the original minutes, and the book into which they are transcribed, with a fraudulent intention with regard to the day when the purging happened; but nothing of that sort was proved. On the contrary, the entry of the purging of the council by Fair's deputy, who was in the interest of the sitting member, was continued on the very same page where Ainslie had finished the account of what was done on the 29th. [465]

It was also shown, with a view to prove fraud, that in the draught of the minutes for the election of a delegate, the name of Hogg was inserted before the election began.

Ainslie, who was called on the part of the petitioners, said; That he had never acted as clerk at any annual election of magistrates and counsellors, but at the last, and at that in 1767, which has been mentioned to have been reduced by a judgment of the court of session. That on that occasion, the purging of the council had taken place some days after the election, and that it was entered in the books immediately after the entry of the election of magistrates, in the same manner as was done on the present occasion, without any particular date. That there was no objection taken to that election on the ground of a deviation from the sett. That since the last election, although it had been much the subject of conversation at Jedburgh, he had never heard a suggestion in the borough, that the purging the council after the 29th of Sep-

tember was contrary to the constitution of the place.

Baillie Anderson, who was called by the counsel for the sitting member said, That he was chosen a counsellor in 1751, and a magistrate in 1752. That he had often assisted at purging the council, and never knew of its being purged the same day with the election of the magistrates, but always some days afterwards. That it is customary for the magistrates to go to church, to hold a court, and to do several corporate acts (which he specified), after their election, and before the purging of the council. Yet, that in all the instances within his knowledge, the entries in the books had been as on the present occasion, without any special date prefixed to the account of the purging the council.

[467] It appeared from the inspection of the books, as far back as they go, that the entries *purported*, that the elections had been begun and completed between the 29th and 23d of September, except in the year 1752, when the new style was introduced. In that year, the first meeting was on the 4th, and the second on the 5th, of October.

COUNSEL for the Petitioners.

The sett of a borough in Scotland, as contained in the convention-books, is binding, and a departure from it vitiates the election; in the same manner as in England, before the statute of the 11th of George I. cap. 4. an election of magistrates was

not good, unless it was holden on the day prescribed by the constitution of the borough (1).

This is the law in Scotland, even in cases where there was no fault in the electors. In the year 1745, the rebels being in possession of Edinburgh, Aberdeen, and other boroughs, at the time when the annual elections, by the constitutions of those places, should have taken place, they could not be holden at that time; and the situation of the boroughs being referred to Sir Dudley Ryder, Lord Prestongrange, and Mr. Murray, they reported, that they were *ipso facto* reduced, and could only [468] be restored by the King's warrant.

COUNSEL for the Sitting Member.

The setts, as transmitted to the convention in 1709, were nothing but a sort of history of the usual mode of election in the different boroughs, such as practice had introduced, and, being produced merely by usage, they may be repealed by subsequent usage. It would be strange if this were not so, in a country where a continued deviation for a length of time can repeal even an act of Parliament.

But, in the present case, the terms of the sett have not been departed from. "*Thereafter*" does not necessarily mean "*on a subsequent part of the same day;*" and the word "*ordinarily*" certainly is not synonymous to "*always.*"

(1) *Vide supra*, p. 41.

If the sense of the word "*thereafter*" is doubtful, it must be explained by the practice in the borough, and it has been proved that the practice is to purge the council some days after the election of the magistrates.

[469] On the 29th of September every one of those were in the council who were to continue so during the year, and made part of the 40 who compose what is called the long council. If there had been no purging till the election of the delegate, all the 40 might have voted at that election (1). The purging is not considered, in any borough, as an essential part of the election. In some boroughs, weeks intervene between the election of magistrates and the purging. In some, the right of purging is annexed to some estate in the neighbourhood. Can it be supposed that the neglect of the proprietor of such an estate to purge the council would vitiate the whole election, and dissolve the corporation?

The cases which happened in the time of the rebellion do not apply. In those cases, the year was elapsed, and, the annual magistrates being gone, there was nobody in the borough entitled to make the new election; but, in the present instance, the new council and magistrates had been elected within the year, so that there were persons existing competent to purge the council.

Suppose the purging, in the present case, to have

(1) *Quere?*

been void, that cannot affect the election of the magistrates, for that was completed within the time specified in the sett. The utmost the court of session would do, in such a case, would be to make a partial reduction of the counsellors illegally chosen. Thus, in the case of Brechin, which happened last year, the election of five deacons was set aside as illegal, but that of the other magistrates continued in force.

When the sett of a borough has been departed from, and the election complained of on that ground, the court of session has refused to reduce the election, and has directed the complaint to be changed to an action of declarator, by which the mode prescribed by the sett might be declared and restored (1).

What is contended for, on the part of the petitioners, would put it in the power of seven persons, who in this borough have the right of purging the council, to avoid the election of all the other members, and thereby reduce the borough, by agreeing among themselves not to exercise their right, within the time beyond which it is said that it cannot be legally exercised.

[471]

If the election of all the magistrates and counsellors had been void, yet, while they were *de facto* possessed of their offices, their election of a delegate is valid, for, by the law of Scotland, the acts of a magistrate are good, while he is in his office,

(1) *Quere?*

although

although his election may afterwards be determined to have been illegal. This is laid down in Macdowal's Institutes, vol. i. p. 406. It was so in the civil law, on which the Scotch law is in a great measure founded (C).

The counsel for the petitioners, in reply, still insisted. That the sett of a borough is so binding, that the departure from it, in any circumstances, avoids the whole election, and they cited the case of this very borough of Jedburgh in the House of Lords, 14 April, 1738, to prove that doctrine; [472] the Marquis of Lothian and others, appellants, against John Hafwell, and others, respondents (1).

They denied that the acts of *de facto* magistrates, unless they be merely ministerial, are good, which they said the election of a delegate is not. They said, that the word "*ordinarily*" in the sett, was used in the sense of "*customarily*," *i. e.* according to the custom of the place.

✎ The counsel for the sitting member denied that the case of Jedburgh in 1738 authorized the inference drawn from it, or that it could apply in any respect to the present cause.

On Monday, the 8th of May, the Committee, by their Chairman, informed the House, that they had determined,

That the sitting member was duly elected (2).

(1) *Quere?*

(2) *Voices*, p. 640.

N O T E S

ON THE CASE OF

NORTH BERWICK, &c.

PAGE 396. (A). The person who drew these petitions seems not to have been aware that any distinction had ever been taken, between offices which disqualify from *sitting in Parliament*, and those which disqualify from *being elected*. *Vide supra*, Case of Milborne Port, vol. i. p. 143. Note (H).

Note
(A.)

P. 442 (B). By the statute of 20 Geo. II. cap. 43. all sheriffships, and stewartries, of districts, being parts only of shires or counties, were extinguished, and their jurisdictions vested in the court of session, § 1. § 3. All other sheriffships and stewartries, not extinguished, and possessed by subjects in inheritance or for life, were resumed, and annexed to the Crown, § 4. And it was enacted that the King should not grant those offices to any person for a longer term than a year, § 5. All high sheriffs and stewards were rendered incapable of acting as *judges* within their shires or stewartries, § 30. By this means those offices became merely nominal; and, although the King still has the power of granting them for the term of a year, I believe, since the statute

Note
(B.)

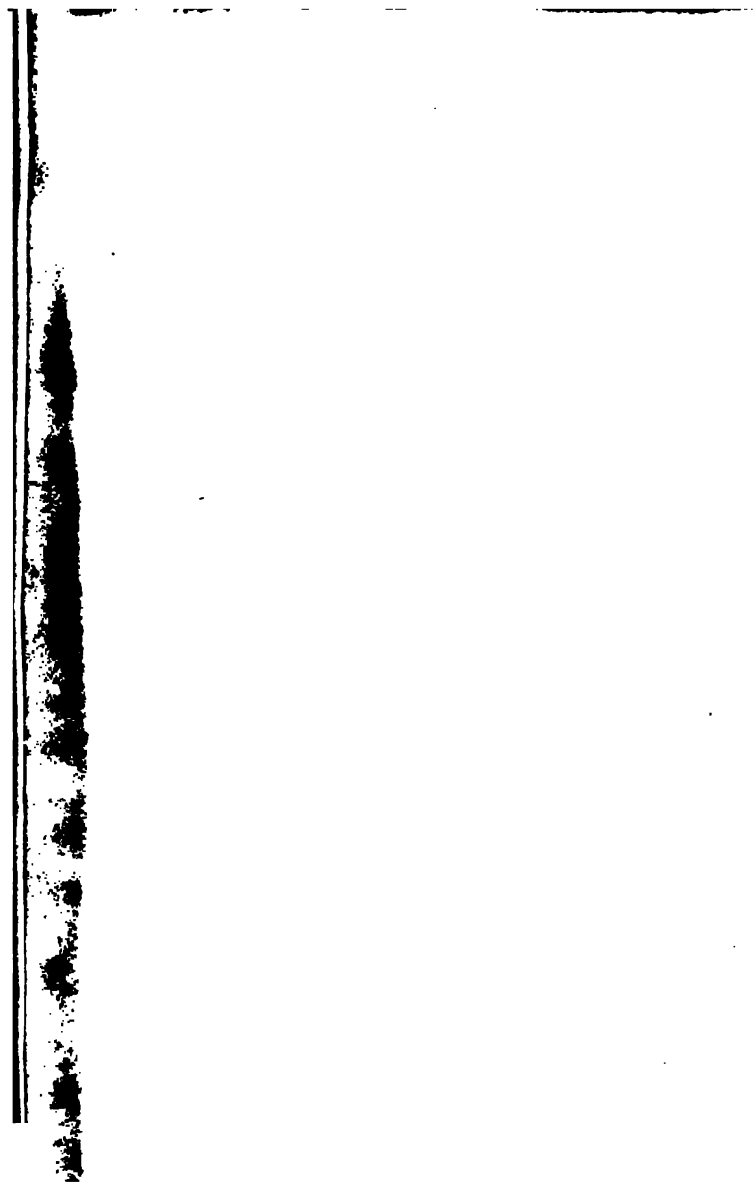
Note
(B.)

statute passed, no high sheriff or steward has been appointed in Scotland. The King is, as it were, high sheriff and steward of each shire and stewartry, and the judicial and ministerial functions are performed by the depute and substitute.

Note
(C.)

P. 471 (C). Macdowal, in the passage referred to, quotes no authority but Viner and Justinian, and seems only to mean to state what the law of England and the civil law hold, concerning the acts of officers *de facto*.

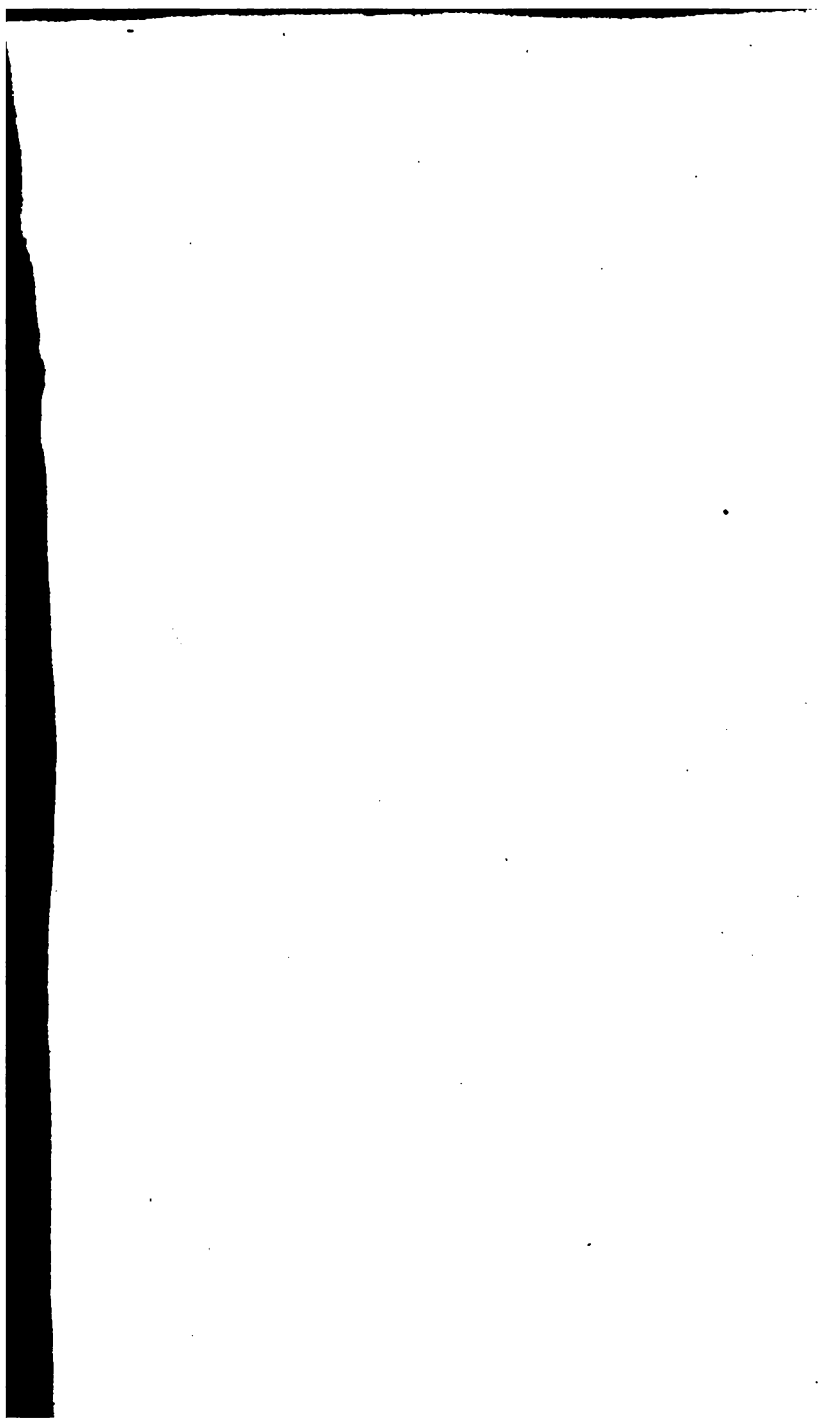
END OF THE SECOND VOLUME.



[REDACTED]

[REDACTED]

[REDACTED]



1

